In the

# Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1674

SANTA ROSA BAND OF INDIANS, *et al.*,
*Plaintiffs and Respondents,*

vs.

KINGS COUNTY, *et al.*,
*Defendants and Petitioners.*

## Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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## Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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### OPINION BELOW

The decision of the U. S. Court of Appeals for the Ninth Circuit herein, and its order denying the petition for rehearing, are attached hereto as Appendix 1. The court's decision has not yet been officially reported.

### JURISDICTION

The decision of the Ninth Circuit was filed on November 3, 1975. Its order denying the petition for rehearing was filed on March 26, 1976. The petition for a writ of certiorari is due on or before June 24, 1976. *American Railway Express Co. v. Levee,* 263 U.S. 19 (1923). This Court has

jurisdiction under 28 U.S.C. § 1254(1). This petition is submitted under Rule 19(b) of this Court's rules, in that this case presents an important question of federal law which has not been decided by this Court.

## QUESTIONS PRESENTED

The essential question in this case is whether counties, in those States which have received jurisdiction over Indian reservations under Public Law 280, 67 Stat. 588 (1953), 28 U.S.C. § 1360 (1970), may apply their land use laws to Indian property located on such reservations. This question is presented in the following forms:

(1) Does Public Law 280, in subjecting Indian reservations to "those civil laws of such State," exclude the application of "county" laws on such reservations?

(2) Does Public Law 280, in prohibiting States from imposing a "regulation of the use" of Indian trust property inconsistently with a federal "treaty," "agreement," "statute," or "regulation," authorize the issuance of a federal regulation *after* the passage of Public Law 280, which regulation precludes counties from regulating the use of Indian trust property under *any* circumstances?

(3) Does the prohibition in Public Law 280 against any State "encumbrance" of Indian trust property, include county land use ordinances?

(4) Does Public Law 280, in prohibiting the States from regulating the use of Indian trust property inconsistently with a federal "statute," prohibit the county from applying its land use laws to property which is the subject of assistance programs administered by federal agencies pursuant to congressional authorization?



## FEDERAL LAWS INVOLVED

This case involves (1) an interpretation of Public Law 280, 67 Stat. 588 (1953), 28 U.S.C. § 1360 (1970), set forth in Appendix 2, (2) a determination of the validity of a regulation issued by the Secretary of the Interior in 1965, 25 C.F.R. § 1.4, set forth in Appendix 3, and (3) an interpretation of 25 U.S.C. § 465, set forth in Appendix 4.

## STATEMENT OF THE CASE

### 1. Statement of the Facts.

The Santa Rosa Band is an Indian tribe organized under section 476 of the Indian Reorganization Act of 1934, 25 U.S.C. §§ 461-478. The tribe occupies the Santa Rosa Rancheria in Kings County, in the State of California. Title to the lands is held in trust by the United States for the benefit of the tribe. 25 U.S.C. § 465.

Plaintiffs Barrios and Baga, both members of the tribe, applied to the Bureau of Indian Affairs (BIA) for funds to purchase mobile homes, to upgrade their existing housing on the rancheria. CT 81, 84.[1] The BIA is authorized to grant such funds as part of its Housing Improvement Program (HIP). The BIA requested the plaintiffs to select mobile homes for purchase, and to submit the purchase contracts to the BIA for approval. *Ibid.* The plaintiffs thereupon selected mobile homes from a local dealer, costing $6200 and $7000 respectively, and submitted the purchase contracts to the BIA for approval. *Ibid.* The BIA approved the contracts, and issued an HIP grant in the amount of $3500 to each plaintiff. Subsequently, the Indian Health Service (IHS), a branch of the Department of Health, Education and Welfare, made plans to provide water and plumbing for the mobile homes.

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1. "CT" is a reference to the Clerk's Transcript.

The plaintiffs plan to use their mobile homes on lands in the rancheria that, under the ordinances of Kings County, are zoned for general agricultural use. CT 126. The county's ordinances, however, authorize the use of mobile homes within that zone, subject to approval by the county's zoning administrator. Such approval is routinely given if the applicant submits a site plan, showing the location of streets, lighting and the proposed use of his mobile home, and if his proposed use does not substantially depart from the purposes and intent of the zoning ordinance. CT 137. Administrative approval can initially be given only for a period of two years, but such approval can be renewed for additional periods and in fact is routinely renewed upon application by the homeowner.[2]

The applicant is not required to pay any fees for such administrative approval, except for a fee of $30 to compensate the county for part of its expenses in preparing and considering an environmental impact report. CT 126. The county is required to prepare and consider such a report under the State's basic environmental land use law, the California Environmental Quality Act, Cal. Pub. Res. Code §§ 21000-21176, which requires counties to prepare and consider such reports prior to approving any land use which may have a significant effect on the environment.

The county's building ordinances also require the plaintiffs to acquire permits for electrical and plumbing hookups. CT 120-121. The ordinances require each plaintiff to pay

2. County records reveal that 287 applications for renewal have been submitted in recent years by persons situated similarly to the plaintiffs, and all have been approved. The county routinely approves such applications if the mobile home is the only dwelling on the site. This information is contained in an affidavit by the Planning Director of Kings County, Defendants' Exhibit AA, which was not before the Ninth Circuit. We are filing a motion with this Court to augment the record by inclusion of this affidavit.



a fee of $19.50 for the permits, and for inspection services. *Ibid.*

Thus, the county's ordinances do not prevent the plaintiffs from using their mobile homes on the rancheria. Rather, they require only that the use of the homes be consistent with various zoning, environmental and building laws, and that minor fees be paid to compensate the county for part of its expenses in administering these laws.

The plaintiffs refused to comply with these laws, or to pay the fees required thereby. Instead, they brought an action in a federal district court, invoking the court's jurisdiction under 28 U.S.C. § 1331. The action seeks declaratory and injunctive relief to restrain enforcement of the county's various ordinances, as applied to the plaintiffs. The tribe, many of whose members are also awaiting HIP mobile home grants from the BIA, joined the action. The district court granted the declaratory and injunctive relief sought by the plaintiffs, and the defendants appealed.

### 2. Decision of the Ninth Circuit.

The Ninth Circuit held that county land use laws are not applicable on Indian reservations under Public Law 280, 28 U.S.C. § 1360, and thus that Kings County's ordinances are not applicable to the plaintiffs. App. 1-27. The court ruled, first, that Public Law 280, in subjecting Indian reservations to "those civil laws of such State . . . that are of general application to private persons or private property," subjects Indian reservations only to "State" laws, not "county" laws. App. 6-18. Second, the court ruled that Public Law 280, in precluding the county from imposing a "regulation of the use" of Indian trust property inconsistently with a federal "treaty," "agreement," "statute" or "regulation," precludes the application of county land use laws by virtue of a federal regulation prohibiting

counties from regulating the use of Indian trust property, 25 C.F.R. § 1.4; the court upheld the validity of the regulation against the charge that it unlawfully revoked authority given to the counties under Public Law 280. App. 18-22. Third, the court ruled that Public Law 280, in precluding the States from imposing an "encumbrance" on Indian trust property, independently precludes the county from regulating the use of such property, App. 22-25. Fourth, the court ruled that the county's ordinances are inconsistent with various federal statutes authorizing federal agencies to administer Indian assistance programs. App. 25-27.

## ARGUMENT

### I. Importance of the Case

This case raises the question whether local land use ordinances, adopted pursuant to the requirements of State laws, are applicable on Indian reservations in those States which have received jurisdiction over Indian reservations under Public Law 280, 28 U.S.C. § 1360. Public Law 280 transfers such jurisdiction to seven States, including California.[3] Moreover, federal law provides a procedure for the assumption of such jurisdiction by other States in the future. 25 U.S.C. §§ 1321, 1322. Thus, the issue in this case is important not only in California, but also in other States which have received jurisdiction under Public Law 280, and in still other States which may receive such jurisdiction in the future.

This case is particularly important in California, for there are a panoply of local land use laws that are generally applicable to private persons and private property, and

3. The six other States are Alaska, Minnesota, Nebraska, Oregon, Wisconsin and Washington. 28 U.S.C. § 1360; *Snohomish County v. Seattle Disposal Co.*, 70 Wash. 668, 425 P.2d 22, 25 (1967), *cert. denied* 389 U.S. 1016 (1967).



thus are potentially applicable to Indians and Indian property. These laws, some of which we shall discuss more fully later, seek to protect a wide variety of interests of local signficance, and indeed of Statewide significance as well. In fact, virtually all such local laws are enacted and enforced pursuant to the statutory directive of the State's Legislature. Major examples of such laws include those that (1) prevent land from being developed or used in a manner that may impair the State's environmental quality, (2) prevent homes from being built and used, and mobile homes from being used, in an unsafe or unsanitary manner, (3) prevent land from being developed or used in an inefficient and disorderly manner, and (4) protect the quality of the State's water, air and coastal resources. See pp. 19-21, *infra*. The Ninth Circuit expressly disapproved the application of some of these laws on Indian reservations, and its decision may be construed to disapprove the application of the remainder, and many others not mentioned. Thus, the court's decision prevents California and its political subdivisions from fully protecting the vital interests which led to the passage of these laws.

The importance of this case is heightened by the fact that it raises an issue, *i.e.* the applicability of county land use laws on Indian reservations under Public Law 280, that is being litigated with increasing frequency, particularly in California. In fact, this very issue has been decided by four federal district courts in California prior to the instant case, and it is significant that *each* of these decisions upheld the applicability of county land use laws on Indian reservations under Public Law 280.[4] Moreover, another

4. In *Rincon Band v. County of San Diego,* 324 F.Supp. 371 (S.D. Cal. 1971), the court held that Indian trust property is subject to a county's anti-gambling ordinances. In *Agua Caliente*

panel of the Ninth Circuit recently observed, in dictum, that Congress, in passing Public Law 280, "may have 'intended to grant to the state the full exercise of the police power,' and thus the ability to enforce, e.g., zoning ordinances or gambling ordinances . . . ." *Capitan Grande Band v. Helix Irrig. Dist.*, 514 F.2d 465, 468 (9th Cir. 1975). Additionally, the instant decision rests principally on its conclusion in favor of the validity of a regulation issued by the Secretary of the Interior in 1965, 25 C.F.R. §1.4, a regulation which revokes the States' limited authority to apply their land use laws on Indian reservations under Public Law

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*Band v. City of Palm Springs*, 347 F.Supp. 42 (C.D. Cal. 1972), the court held that such property is subject to a county's zoning ordinances. In *Madrigal v. County of Riverside*, No. 70-1893-EC (C.D. Cal. 1971), the court held that such property is subject to a county's ordinances limiting the performance of "rock" festivals. In *Ricci v. County of Riverside*, No. 71-1134-EC (C.D. Cal. 1972), the court held that such property is subject to a county's building ordinances.

The *Rincon Band*, *Madrigal* and *Ricci* cases were dismissed by the Ninth Circuit on grounds of mootness. See 495 F.2d 1 (9th Cir. 1974), *cert. denied* 419 U.S. 1008 (1974). The *Agua Caliente* was dismissed for the same reason, in an unpublished order of January 24, 1975.

The issue in this case is also raised in *United States v. Humboldt County and State of California*, No. C-74-2526 RFP (N.D. Cal.), currently pending before a federal district court in California. The court in that case recently announced its intention, shortly after the decision of the Ninth Circuit in the instant case became final, to enjoin the State and the county from applying various State and county land use laws on the Indian reservation in that case.

Finally, the issue in this case was also raised in *Snohomish County v. Seattle Disposal Co.*, 70 Wash. 668, 425 P.2d 22, 25 (1967), *cert. denied* 389 U.S. 1016 (1967), where the Washington Supreme Court ruled, in a split decision, that county zoning ordinances are inapplicable on Indian reservations under Public Law 280.

The United States, in amicus briefs submitted to the Ninth Circuit in the *Rincon Band*, *Agua Caliente* and *Ricci* cases, urged the views which formed the basis of the Ninth Circuit's decision in the instant case. For the Court's convenience, we are lodging copies of the United States' three amicus briefs with the Clerk of this Court.



280; however, every federal court which has considered this question prior to the instant case has ruled that the regulation is invalid, to the extent that it revokes the authority of a State to apply its land use laws on Indian reservations. See p. 26, *infra*. Thus, the instant decision represents an abrupt departure from the direction taken by federal courts in resolving the issue in this litigation. The inconsistency between the instant decision and those of the other federal courts—whose obligation to protect Indian rights is no less than that of the Ninth Circuit here—warrants, we believe, a critical examination of the decision by this Court.

The Ninth Circuit's decision is also inconsistent with a recent decision of a California appellate court in *People v. Rhoades*, 12 Cal.App.3d 720, 90 Cal. Rptr. 794 (1970), *cert. denied* 404 U.S. 823 (1971). There, an action was brought against an Indian who, in building a house on an Indian reservation in the midst of valuable forest lands, refused to comply with a State land use law requiring a firebreak to be built around his house; the purpose of the State law is to protect the surrounding forest lands from destruction by fire. The court held that, under Public Law 280, the Indian must comply with the State firebreak law. Thus, the decision of the California appellate court is directly contrary to the decision in this case. The instant decision would apparently allow the Indian to build his house without complying with the State's firebreak law, and thus prevent California from insuring the protection of its valuable forest areas. Further, a lower State court in California may be required, in a future case, to follow the precedent of its own appellate court, rather than that of a federal appellate court. See, *e.g.*, *Auto Equity Sales, Inc. v. Superior Court*, 57 Cal.2d 450, 369 P.2d 937 (1962).

Thus, the need to resolve the conflict between these appellate decisions strengthens, we believe, the need for this Court to review the Ninth Circuit's decision.

We now turn to the merits of the controversy.

## II. Merits of the Case

Federal Indian law has steadily evolved from the time that Justice Marshall ruled, in *Worcester v. Georgia,* 6 Pet. (32 U.S.) 515 (1832), that Indian reservations are distinct nations which are beyond the reach of the laws of the surrounding States. Indian reservations are now regarded, within limits which are still being worked out by this Court, as subject to State laws that do not conflict with federal laws, and to a lesser degree with tribal self-government. Compare *Organized Village of Kake v. Egan,* 369 U.S. 60, 67-68, 71-75 (1962), *Williams v. Lee,* 358 U.S. 217, 220-221 (1959), *Mescalero Apache Tribe v. Jones,* 411 U.S. 145 (1973), with *McClanahan v. Arizona State Tax Comm'n,* 411 U.S. 164 (1973). However, this judicial history is largely inapplicable in this case, for this case involves the interpretation of a federal statute, Public Law 280, which transfers civil and criminal jurisdiction over Indian reservations in certain States to the States themselves. Thus, this case presents the interpretation of a singular federal statute giving certain States broad control over Indian affairs, not an application of the common law principle that the States, at most, have very limited control over Indian affairs.

In passing Public Law 280, Congress recognized that Indian tribes in certain States, including California, had progressed to the point that their members should be assimilated, within limits, into the society and world beyond the reservation.[5] The House and Senate reports explaining the act made this clear, stating:

> "This legislation . . . has two coordinate aims: First, withdrawal of Federal responsibility for Indian affairs wherever practicable; and second, termination of the subjection of Indians to Federal laws applicable to Indians as such." S. Rep. No. 699 (incorporating H.R. Rep. No. 848), 83d Cong., 1st Sess. 3 (1953).[6]

Congress has not taken the next step and terminated the Indian reservations in these States, or dismantled the BIA's operations in these States; indeed, California requested that Congress not take this step. Cal. Sen. J. Res. No. 4 (1954). But neither has Congress taken a step backward and revoked the jurisdiction of those States under Public Law 280. Thus, current congressional policy provides for limited, but not absolute, assimilation of Indians in States affected by Public Law 280.

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5. As the court stated in *United States v. Brown*, 334 F.Supp. 536 (D. Neb. 1971), in explaining Public Law 280:
> "The action of Congress in placing jurisdiction over Indians in the hands of the states had as its purpose the elimination of the legal impediments standing in the way of the Indian becoming a first class citizen. Congress apparently assumed that subjecting the Indian to equality of the responsibilities of state law would make him equal in all respects to other citizens of the State."

6. Public Law 280 should be read *in pari materia* with House Concurrent Resolution No. 108, issued two weeks before the passage of Public Law 280, which stated:
> "Whereas it is the policy of Congress, as rapidly as possible to make the Indians within the territorial limits of the United States subject to the same laws and entitled to the same privileges and responsibilities as are applicable to other citizens of the United States . . . .
>
> "That it is declared to be the sense of Congress that, at the earliest possible time, all the Indian tribes and the individual members thereof located with the State of California, . . . . should be free from Federal supervision and control and from all disabilities and limitations specially applicable to Indians . . . ." 67 Stat. B 132 (1953).

Public Law 280 was passed only after the affected tribes and the affected States were consulted, and had agreed to the transfer of jurisdiction to the States. S. Rep. No. 699, 83d Cong., 1st Sess. 5-6 (1953). Tribes which objected to the transfer of jurisdiction were exempted from the jurisdiction given to the States, and States which felt incapable of administering and enforcing their civil and criminal laws on Indian reservations were not given such jurisdiction at all. *Ibid.* None of California's Indian tribes objected to the transfer of jurisdiction, and thus all such tribes are included in the jurisdiction given to California. *Ibid.*[7]

Before turning to the language of Public Law 280, it may be helpful to briefly describe the Ninth Circuit's general approach to this case. First, the court largely resolved the issues in this case under the canon of construction that requires ambiguities in federal Indian statutes to be resolved favorably to the Indians. See, *e.g., Antoine v. Washington,* 420 U.S. 194, 199-200 (1975). In order to invoke this canon of construction, the court found that the language of Public Law 280 is "ambiguous" in almost every respect. App. 7-8, 23. As we shall see, however, this language is eminently clear, if given its simple, plain meaning. In fact, another panel of the Ninth Circuit has emphasized that the language of this act is "unambiguous." *Anderson v. Gladden,* 293 F.2d 463, 466 (9th Cir. 1961). Moreover, as we shall see, the court in this case continually failed to examine the act's legislative history to clarify the language which it found to be "ambiguous," apparently assuming that it was relieved from this responsibility by the canon of

7. Congress enacted a law in 1968 to insure that tribes in other States will also be consulted, and their consent obtained, before such States are authorized to receive civil and criminal jurisdiction over Indian reservations. 25 U.S.C. § 1321, 1322.



construction applicable to ambiguous Indian statutes. See pp. 17-19, 23-24, 38-39, *infra.* Even worse, the court resolved some of these "ambiguities" in a way that makes Public Law 280 internally inconsistent. See pp. 30-31, *infra.* In effect, the court brushed aside the interpretative aids that require a statute to be interpreted consistently with its legislative history, and not inconsistently with its internal parts. It used the canon of construction as a substitute for, rather than a supplement to, these aids, thus achieving a result that bears no relationship to what Congress intended to accomplish in passing Public Law 280. As this Court recently declared in *DeCoteau v. District Court,* 420 U.S. 425, 449 (1975):

> "A canon of construction [requiring ambiguous statutes to be interpreted favorably to Indians] is not a license to disregard clear expressions of tribal and congressional intent. . . . Some might wish they had spoken differently, but we cannot remake history."

Second, the Ninth Circuit stated that Congress "has now rejected" and "discarded" the policy underlying Public Law 280. App. 13. It is, we submit, presumptuous for a court to conclude that Congress has "rejected" a policy underlying a statute still in full force and effect, a statute which has withstood efforts at repeal. See, *e.g.,* S. 1328, 94th Cong., 1st Sess. (1975). The only authority cited by the court shows, as we mentioned above, that Congress has not taken the additional step of *terminating* Indian reservations, a step which would dismantle the BIA's supervision of Indians and provide for *absolute* assimilation of Indians with other social groups.[8] It can hardly be thus

8. The court cited a statement by former President Nixon indicating that his administration no longer advocated the termination of Indian reservations, a recent congressional act that authorizes financing of the development of Indian tribes, 25 U.S.C. § 1451, and a recent congressional act that requires tribes in a particular

concluded that Congress has abandoned the policy of Public Law 280, which *preserves* existing reservations, continues limited supervision of Indians by the BIA and—by providing for State civil and criminal jurisdiction over Indian reservations—provides for *limited* assimilation of Indians. The fact that Congress has not established the first policy hardly justifies the conclusion that Congress has abandoned the second. The court's conclusion to the contrary is based on a confusion between these different congressional policies. Since Congress has not repealed Public Law 280, it evidently believes that Public Law 280 continues to serve a useful purpose in those States, such as California, where Indians "have reached a stage of acculturation and development that makes desirable extension of State civil jurisdiction" to Indian reservations. S. Rep. No. 699 (incorporating H.R. Rep. No. 848), 83d Cong., 1st Sess. 5 (1953). Accordingly, the court was clearly wrong in suggesting that Congress has "rejected" the policy underlying Public Law 280.

Even more disturbing, however, is the clear inference that the court, in interpreting Public Law 280, was largely influenced by its view that Congress has "rejected" the policy underlying that law. No citation is necessary, we believe, that a statute must be interpreted in light of Congress' intent at the time that the statute was enacted, not in light of judicial speculation, wholly erroneous in this case, about what Congress thinks about the statute today. If Congress wishes to change the policy underlying that law, it has an obvious legislative remedy at its disposal; its failure to

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State to give their consent before that State can assume civil and criminal jurisdiction over Indian reservations, 25 U.S.C. §§ 1311-1312, 1321-1326. App. 11-12n.7, 15 n.12. None of these citations, of course, indicate a congressional rejection of the policy underlying Public Law 280.



exercise that remedy clearly indicates that it has not changed its policy. It is entirely improper for a court, by a misguided application of the canon of construction applicable to ambiguous Indian statutes, to effectively change that policy on the unfounded pretext that Congress would legislate differently today.

### A. "CIVIL LAWS OF SUCH STATE."

Public Law 280 provides, in relevant part:

> "(a) Each of the States or Territories listed in the following table shall have jurisdiction over civil causes of action between Indians or to which Indians are parties which arise in the areas of Indian country listed opposite the name of the State or Territory to the same extent that such State or Territory has jurisdiction over other civil causes of action, and *those civil laws of such State or Territory that are of general application to private persons or private property shall have the same force and effect within such Indian country as they have elsewhere within the State or Territory:* . . .
>
> "(b) Nothing in this section shall authorize the alienation, *encumbrance,* or taxation of any real or personal property, including water rights, belonging to any Indian or any Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States; or shall authorize *regulation of the use* of such property in a manner inconsistent with any *Federal treaty, agreement, or statute or with any regulation made pursuant thereto;* or shall confer jurisdiction upon the State to adjudicate, in probate proceedings or otherwise, the ownership or right to possession of such property or any interest therein.
>
> "(c) Any *tribal ordinance or custom* heretofore or hereafter adopted by an Indian tribe, band, or community in the exercise of any authority which it may

possess shall, if not inconsistent with any applicable civil law of the State, be given full force and effect in the determination of civil causes of action pursuant to this section." 28 U.S.C. § 1360. (Emphasis added.)[9]

Thus, subdivision (a) provides that "State" laws of "general application to private persons and private property" are applicable on Indian reservations, subdivision (b) provides an exception for certain types of Indian trust property, and subdivision (c) authorizes tribes to adopt laws and customs not inconsistent with State law.

The Ninth Circuit held that subdivision (a) of Public Law 280, in subjecting Indian reservations to "those civil laws of such State . . . that are of general application to private persons or private property," is "ambiguous." App. 8. Under the usual canon of construction, the court ruled that the statutory reference must be construed to exclude the application of "county" laws, as opposed to "State" laws, on Indian reservations. *Ibid.*

There is, we submit, nothing ambiguous about the statutory reference. It is well known that counties are political subdivisions of the State. Cal. Const., Art. XI, § 1; *County of Los Angeles v. Riley,* 6 Cal.2d 621, 627, 59 P.2d 139, 141 (1936); *Griffin v. Colusa County,* 44 Cal. App.2d 915, 920, 113 P.2d 270, 273 (1941).[10] Their authority to pass laws is

9. The above-quoted portion of Public Law 280 relates to the civil jurisdiction transferred to the States under that law. The criminal jurisdiction transferred under that law is codified at 18 U.S.C. § 1162.

10. The Court stated in *County of Los Angeles v. Riley, supra:* "Counties are not municipal corporations, but are political subdivisions of the state for purposes of government. With certain exceptions, the powers and functions of the counties have a direct and exclusive reference to the general policy of the state and are, in fact, but a branch of the general administration of that policy. Counties are vested by the state with a variety of powers, which the state itself may assume or resume and directly exercise." 6 Cal.2d at 627; 59 P.2d at 141.



derived from, and delegated to them under, the State's legislative power. *In re Isch,* 174 Cal. 180, 162 Pac. 1026 (1917); *City of Bakersfield v. Miller,* 64 Cal.2d 93, 410 P.2d 393 (1966); *Freeman v. Contra Costa County Water Dist.,* 18 Cal. App.3d 404, 95 Cal. Rptr. 852 (1971). Their laws are part of the body of State law. *County of Plumas v. Wheeler,* 149 Cal. 758, 87 Pac. 909 (1906); *City of San Luis Obispo v. Fitzgerald,* 126 Cal. 279, 281, 58 Pac. 699 (1899).[11] Thus, Public Law 280, in making reference to the laws of the "State," was obviously not intended to exclude the laws of its political subdivisions.[12] The Ninth Circuit, by claiming to perceive an ambiguity that does not exist, has reached a result that defies the simple, common sense meaning intended by Congress.

Moreover, if the court believed that the statute is ambiguous on its face, it could easily have resolved the ambiguity by referring to the act's legislative history. The court, however, totally ignored this history.[13] This history

11. According to section 2b of the Restatement of Conflicts: "The body of law of a state is not necessarily applicable equally to all persons or places within the state. Thus, different classes of persons or different localities may be governed by different laws, or local subdivisions of the state may be allowed by the state to make laws applicable in some particulars within their own boundaries. All such laws, however, form a portion of the laws of the state."

12. The limiting phrase in subdivision (a) of Public Law 280, subjecting Indians only to laws of "general application to private persons or private property," is obviously intended to assure that the law in question, whether passed by the State's Legislature or by the county's board of supervisors, is applicable to Indians and non-Indians on the same terms, and thus seeks to prevent the State and its political subdivisions from passing laws that discriminate, or even potentially discriminate, against Indians.

13. The Ninth Circuit generally alluded to other references in the legislative history indicating that the act was intended to assimilate Indians and non-Indians, and the court stated that these references were not sufficiently clear to establish an intent to subject

shows beyond doubt that no distinction was intended between "State" and "county" laws. The Senate and House reports accompanying Public Law 280 noted that the BIA had contacted "State and *local authorities*" in the affected States, most of whom had indicated their willingness to accept the proposed transfer of jurisdiction. S. Rep. No. 699 (incorporating H.R. Rep. No. 848), 83d Cong., 1st Sess. 5 (1953). (Emphasis added.) The reports further noted that Nevada was not given jurisdiction under the bill, because "authorities of some *counties* have indicated their willingness to accept jurisdiction, others opposed it, and still others stated they would accept such jurisdiction only with an accompanying Federal subsidy." *Id.* at 6. (Emphasis added.) Appended to the reports was a letter from the Assistant Secretary of the Interior to the chairman of the House Committee on Interior and Insular Affairs; the letter confirmed that the BIA had consulted with "State and *local authorities*" in the affected States, that "State and *local authorities*" were agreeable to the proposed transfer of jurisdiction, that "some of the *counties*" in Nevada were opposed to the transfer of jurisdiction, and that the BIA had not consulted with "State and *local authorities*" in States other than those specifically mentioned. *Id.* at 6-7. (Emphasis added.) Finally, the reports noted that the bill was consistent with pending federal legislation which would transfer responsibility for certain Indian health and welfare programs to a "State, *county, or municipal subdivision* . . . ." *Id.* at 4. (Emphasis added.) Thus, the act's legislative history unequivocally shows that the act was intended to subject Indians to the laws of the States political subdivisions, and the Ninth Circuit was able to reach the opposite result only by totally ignoring this history.

Indians to county laws. App. 9-10. Whether or not these references are thus lacking in clarity, the fact remains that the court wholly ignored *other* references in the act's legislative history, cited in the text above, which clearly indicate an intent to subject Indians to county laws.



Moreover, a distinction between "State" and "county" laws is wholly unrealistic and unworkable. Counties play a vital, indispensable role in administering and enforcing laws enacted by the State's Legislature, and thus are, in a real and practical sense, an administrative arm of the Legislature. For example, following the congressional example of the National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321-4347, California enacted a major environmental land use law, the California Environmental Quality Act (CEQA), Cal. Pub. Res. Code §§ 21000-21176. *Friends of Mammoth v. Board of Supervisors,* 8 Cal.3d 247, 502 P.2d 1049 (1972). Under CEQA, counties are required to prepare and consider environmental impact reports, pursuant to criteria spelled out in the act, before approving any land use that may have a significant effect on the environment; the Ninth Circuit, by ruling that the plaintiffs need not pay fees to defer part of the county's expenses in preparing and considering such reports, apparently ruled that CEQA is not applicable to the plaintiffs, even though that act was passed by the State's Legislature.

Another law passed by the State's Legislature requires counties to administer and enforce State regulations imposing minimum safety and sanitation standards for certain physical structures, including mobile homes. Cal. Health & Saf. Code §§ 17910-17995, 18000-18080. It was pursuant to this act that Kings County passed the building ordinance which the court held inapplicable to the plaintiffs' mobile homes. Another State law requires counties to adopt general plans for the use of land, pursuant to criteria

spelled out in the act, and to adopt zoning ordinances implementing such plans. Cal. Govt. Code §§ 65100-65700, 65800-65907. It was pursuant to these acts that Kings County adopted the zoning regulations that the court held inapplicable to the plaintiffs' mobile homes.

Thus, the various county ordinances in this case were not adopted pursuant to any inherent, sovereign powers retained by the counties. Rather, they were adopted pursuant to directives of the State's Legislature, directives which spell out specific criteria which the counties must follow in administering the State law. Thus, there is no workable distinction between the laws of a State and those of its counties. The Ninth Circuit, under the guise of prohibiting the application of "county" laws on Indian reservations, has effectively prevented the State Legislature from utilizing counties to administer and enforce its own "State" laws. In this way, the court, although disclaiming an intention to prohibit the application of "State" laws on Indian reservations, has achieved the very result which it disclaimed.

Moreover, the Ninth Circuit's distinction would apparently also preclude California's many *regional* agencies from exercising jurisdiction over Indian reservations. Regional agencies, for example, administer (1) the State's water quality laws, which require waste dischargers to secure permits from regional water quality control boards, Cal. Wat. Code §§ 13000-13442, (2) the State's air quality laws, which require air polluters to obtain permits from air pollution control districts, Cal. Health & Saf. Code §§ 42300-42313, and (3) the State's coastal laws, which require those who build projects in the State's coastal area to obtain permits from regional coastal commissions, Cal. Pub. Res. Code §§ 27000-27650. Some of these agencies,



such as the air agencies, exercise jurisdiction only over a single county, and other agencies, such as water agencies, exercise jurisdiction over many counties. *Ibid.*[14] It is unclear whether these regional agencies are classifiable as "State" or "county" agencies for purposes of the Ninth Circuit's decision, since their jurisdiction falls somewhere in between that of "State" and "county" agencies. Since the jurisdiction of *each* such agency does not extend throughout the State, the Ninth Circuit's decision would probably preclude such agencies from exercising jurisdiction over Indian reservations. If so, the Ninth Circuit's decision would prevent these agencies from applying "State" laws on such reservations, and thus again achieve a result which the court disclaimed.

In summary, the Ninth Circuit's decision reflects little awareness of the vital role played by counties and regional agencies in the administration of California law. The court obviously assumed that the jurisdiction of the State and its political subdivisions can be easily differentiated, an assumption which does not accord with reality. The fact that the State's Legislature, for reasons of efficiency, economy and convenience, entrusts counties with the administration of certain of its laws, rather than creates new bureaucracies for that purpose, is hardly relevant in determining whether the Legislature's laws should be applicable on Indian reservations. Moreover, the fact that the Legislature in other instances creates new bureaucracies for that purpose, but gives them regional rather than Statewide jurisdiction, is similarly irrelevant. The Legislature's laws are the "civil laws of such State," within the meaning

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14. Some of these county-wide air agencies have been consolidate, thus resulting in the creation of agencies with jurisdiction over many counties. See Cal. Health & Saf. Code §§ 40300-40392, 40200-40276.

of Public Law 280, whether they are administered by counties, regional agencies or agencies with Statewide jurisdiction. Thus, the distinction suggested by the Ninth Circuit is hopelessly unrealistic and unworkable, which is undoubtedly the reason that the distinction never even occurred to Congress in passing Public Law 280.[15]

**B. "REGULATION OF THE USE" OF INDIAN TRUST PROPERTY.**

**1. Limited Applicability of State Land Use Laws.**

Public Law 280 provides that the State may not impose a "regulation of the use" of Indian trust property that conflicts with a federal "treaty, agreement, or statute or with any regulation made pursuant thereto." 28 U.S.C. § 1360(b). This provision thus authorizes a "regulation of the use" of

15. In distinguishing between "State" and "county" laws, the court relied on the principle that the inherent "sovereignty" of Indian tribes, although insufficient in itself to justify the exclusion of State or county laws on Indian reservations, provides an historical backdrop which supports the conclusion that applicable federal law should be so construed. App. 13-16. Compare *McClanahan v. Arizona State Tax Comm'n,* 411 U.S. 164 (1973), with *Organized Village of Kake v. Egan,* 369 U.S. 60, 67-68, 71-75 (1962). However, the principle of tribal sovereignty is of no help in interpreting Public Law 280, for subdivision (c) thereof clearly subordinates tribal laws and customs to conflicting State laws. 28 U.S.C. § 1360 (c). Indeed, since the objective of Public Law 280 is to promote the limited assimilation of Indians, that objective would be frustrated if the tribes were permitted to adopt laws or pursue customs that conflict with laws applicable to others.

Moreover, the principle of tribal sovereignty has only been invoked to support the exclusion of *State* laws on Indian reservations, where States have not received jurisdiction over such reservations under Public Law 280. See, *e.g., McClanahan v. Arizona State Tax Comm'n, supra.* That principle has never been applied, and would not seem applicable, to exclude the application of *county* laws on Indian reservations, where, as in States which have received jurisdiction under Public Law 280, there is otherwise no question concerning the applicability of *State* laws. In particular, the principle can hardly be invoked, as it has been invoked by the Ninth Circuit, to preclude the application of State laws administered by counties, where the court concedes that State laws are otherwise applicable.



such property, to the extent not inconsistent with specified federal laws. State land use laws, such as county zoning and building ordinances, are of course a form of the "regulation of the use" of property. Thus, Public Law 280 clearly authorizes the application of State land use laws to Indian trust property, to the extent not inconsistent with specified federal laws.

The legislative history of Public Law 280 clearly indicates that Congress consciously chose to authorize limited State land use regulation of Indian trust property. H.R. 1063, the bill which eventually was enacted as Public Law 280, originally provided:

> "[*N*]*othing in this section shall authorize the* alienation, encumbrance, or taxation of such [Indian trust] property or the adjudication or *regulation of its use* . . . ." 99 Cong. Rec. 9962, 83d Cong., 1st Sess. (1953). (Emphasis added.)

A similar provision had been contained in an earlier bill, H.R. 3624, which was introduced in Congress in 1951. H.R. 3624, 82d Cong., 1st Sess. (1951). Originally, the latter bill contained no language prohibiting the "regulation of its [Indian trust property] use." "State Legal Jurisdiction in Indian Country," *Hearings before the Subcommittee on Indian Affairs of the Interior and Insular Affairs Committee of the House of Representatives,* 82d Cong., 2d Sess., ser. 11, at 28-29 (1952). Such language was inserted in the earlier bill, however, at the request of the U. S. Department of the Interior. *Ibid.* The Department stated that, as a result of the additional language:

> "The State courts could not take any action that would affect the status of this [trust] property in any way or deprive any Indians of any of the benefits therefrom." *Ibid.*

Thus, the language suggested by the Department, which found its way into H.R. 1063, would have prohibited State regulation of the use of Indian trust property under *any* circumstances. However, H.R. 1063 was amended to prohibit such regulation only to the extent inconsistent with a federal treaty, agreement, statute or regulation. Thus, the amended bill, which became law, clearly authorized *limited* State regulation of the use of such property.[16]

16. In thus providing for limited State regulation of the use of Indian trust property, Public Law 280 evidently sought to avoid creating a checkerboard pattern of land use controls on Indian reservations, except to the extent that this result is necessitated by federal treaties, agreements, statutes or regulations. On many reservations, particularly in California, much reservation land is owned by surrounding non-Indian urban communities, or otherwise owned and occupied by non-Indian landowners; this result derives from the effect of the General Allotment Act of 1887, 24 Stat. 388, which allowed non-Indian settlers to acquire "surplus" lands on certain reservations. See, *e.g.*, H.R. Rep. No. 956, 81st Cong., 1st Sess. (1949); *Mattz v. Arnett*, 412 U.S. 481 (1973). The State's land use laws are clearly applicable on reservation lands owned by non-Indian communities and individuals. Cf. *United States v. McBratney*, 104 U.S. 621 (1881); *Draper v. United States*, 164 U.S. 240 (1896). Therefore, Congress intended to make such laws applicable on other reservation lands under Public Law 280, in order to insure uniformity of land use controls to the extent compatible with Indian rights based on clearly-defined federal laws. Otherwise, an Indian allottee would be allowed to develop his land in a random, haphazard manner without complying with the land use laws applicable to adjoining lands owned by his non-Indian neighbor. In fact, Public Law 280 was modeled after Public Law 322, an act which provided that the lands of the Agua Caliente Indian Reservation in California "shall be subject to the laws, civil and criminal, of the State of California . . . ." 63 Stat. 705 (1951) The latter act was enacted, according to its House report, in response to a "unique problem" resulting from the fact that Indian lands are "intermingled in a *checkerboard pattern* with highly developed urban land of great value." H.R. Rep. No. 956, 81st Cong., 1st Sess. 2 (1949). (Emphasis added.) Accordingly, the act's author stated:

> "[T]his section of the bill is for the purpose of conferring jurisdiction over the police, fire, and sanitary regulations, and so on, upon the State of California" *Hearings on H.R. 4616 Before the Subcommittee on Indian Affairs of the Committee on Public Lands*, 81st Cong., 1st Sess., ser. 16 (1949).



**2. The Secretary's "Regulation".**

The Ninth Circuit held that the county's land use ordinances are inconsistent with a "regulation" validly adopted by the Secretary of the Interior in 1965, 25 C.F.R. § 1.4. App. 18-22, 31-32. The regulation prohibits "a State or its political subdivisions" from "limiting, zoning or otherwise governing, regulating or controlling the use or development" of Indian trust property which is "leased from or held or used under agreement with and belonging to" any Indian or tribe. *Ibid.*

The Secretary's regulation is clearly invalid, at least to the extent that it is applicable in States which have received jurisdiction over Indian reservations under Public Law 280.[17] As we have noted, that statute authorizes the States to impose a "regulation of the use" of Indian trust property, to the extent not inconsistent with a federal treaty, agreement, statute or regulation. However, the Secretary's regulation totally precludes the States and their political subdivisions from "regulating . . . the use" of such property, even if the regulation is not inconsistent with these designated federal laws.[18] Thus, the regulation seeks to revoke the limited authority given to the States and their political subdivisions under Public Law 280. If the regulation had been issued *prior* to the passage of that act, it might be argued that the act, in precluding the States from regulating Indian trust property inconsistently with a federal "regulation," was intended to incorporate the Secretary's absolute prohibition of such State regulatory efforts. However, the

17. The court failed to consider whether the regulation was meant to be applied only to States which have not received jurisdiction over Indian reservations under Public Law 280.

18. The Secretary subsequently authorized by regulation the application of "State" land use laws, but not "local" land use laws, on Indian reservations. 30 Fed. Reg. 8722 (July 2, 1965).

regulation was issued in 1965, *after* the passage of Public Law 280. Obviously the act does not authorize the Secretary to unilaterally revoke the limited jurisdiction which the act gives to the States and their political subdivisions. It thus follows that the Secretary, in seeking to revoke such jurisdiction, has exceeded his authority under the act. Cf. *Organized Village of Kake v. Egan,* 369 U.S. 60, 63 (1962); *Hynes v. Grimes Packing Co.,* 337 U.S. 86 (1949). Accordingly, two federal district courts have held that the regulation is invalid. *Rincon Band v. County of San Diego,* 324 F. Supp. 371, 377-378 (S.D. Cal. 1971), *dismissed as moot* 495 F.2d 1 (9th Cir. 1974); *Norvell v. Sangre de Cristo Development Co., Inc.,* 372 F.Supp. 348 (D. N. Mex. 1974).[19]

The Ninth Circuit held, however, that the regulation is not invalid, because it was issued pursuant to a provision in the Indian Reorganization Act of 1934, 48 Stat. 985, a provision authorizing the Secretary to acquire lands "for the purpose of providing land for Indians," 25 U.S.C. § 465. App. 20-22, 33. However, this conclusion ignores the fact

19. The validity of the regulation has been upheld in two other cases, but not as applied to prohibit a county from applying its laws on Indian reservations under Public Law 280. In *County of San Bernardino v. LaMar,* 271 Cal. App.2d 718, 76 Cal. Rptr. 547 (1969), the regulation, as amended to authorize the application of "State" land use laws on Indian reservations, see n. 18, *supra,* was held to *authorize* a county in California to apply the provisions of a State law, the Mobilehome Parks Act, Cal. Health & Saf. Code §§ 18200-18220, to a lessee of Indian trust property. In *Sangre de Cristo Development Corp. v. City of Santa Fe,* 84 N.M. 343, 503 P.2d 323 (1972), the validity of the regulation was upheld as applied to a State, New Mexico, which has not received jurisdiction under Public Law 280. To our knowledge, the only courts which have heretofore considered the validity of the regulation, as applied to prohibit a county from applying its land use laws on Indian reservations under Public Law 280, are those cited in the text, and those courts held that the regulation as so applied is invalid.



that the regulation, according to its preamble, was merely intended to *interpret* federal law; it was not intended to *effectuate* federal law, in a quasi-legislative sense, by adding to the body of federal law.[20] Thus, the regulation has no greater force or effect than the statute which it interprets. Certainly the provision in the 1934 act cited by the court does not, in itself, prohibit the application of State land use laws on Indian reservations. The provision merely authorizes the Secretary to acquire lands for Indians, and does not limit the application of State land use laws on such lands.[21] Therefore, the regulation improperly interprets the 1934 provision, and is thus invalid.[22]

Even if we assume *arguendo* that the regulation was intended to effectuate the provision in the 1934 act, rather

20. The regulation's preamble stated that its purpose was merely to "enunciate and particularize . . . the sense of existing law." 30 Fed. Reg. 6438 (May 8, 1965). See App. 31.

The distinction between interpretative and quasi-legislative regulations was spelled out by the U S. Attorney General, as follows:

> "Administrative rule-making, in any event, includes the formulation of both legally binding regulations and interpretative regulations. The former receive statutory force upon going into effect. The latter do not receive statutory force and their validity is subject to challenge in any court proceeding in which their application may be in question. The statutes themselves and not the regulations remain in theory the sole criterion of what the law authorizes or compels and what it forbids . . . ." Final Report of Attorney General's Committee on Administrative Procedures, 100 (1941).

21. In fact, since the provision expressly provides that "such lands or rights shall be exempt from State and local taxation," 25 U.S.C. § 465, it infers that all other State and local laws are applicable on such lands.

22. If the regulation was intended to interpret the effect of Public Law 280, it is equally invalid. As we have noted, Public Law 280 only prohibits the application of State land use laws on Indian reservations that are inconsistent with federal treaties, agreements, statutes or regulations.

than to interpret that or other provisions of law, the regulation is still invalid. The Secretary's power to issue regulations to effectuate federal Indian statutes is found in 25 U.S.C. §§ 2 and 9, which authorize the President to prescribe regulations for effectuating statutes "relating to Indian affairs," to settle accounts of "Indian affairs," and concerning "the management of all Indian affairs and matters arising out of Indian relations." This Court has squarely held that the Secretary's authority under these sections is merely to "implement *specific* laws," and to manage "relations between the United States and the Indians—*not a general power to make rules governing Indian conduct.*" *Organized Village of Kake v. Egan,* 369 U.S. 60, 63 (1962). (Emphasis added.) Accord, *Hynes v. Grimes Packing Co.,* 337 U.S. 86 (1949). In the *Kake Village* and *Hynes* cases, the Court voided regulations issued by the Secretary limiting the effect of State laws as applied to Indians, on grounds that Congress had not indicated by "specific and unambiguous legislation" that the Secretary had such authority. *Hynes v. Grimes Packing Co., supra* at 105. Since the provision in the 1934 act does not specifically, or even inferentially, authorize the Secretary to limit the effect of State land use laws on Indian reservations, the Secretary has exceeded his authority in issuing the regulation, just as he exceeded his authority in issuing the regulations in the *Kake Village* and *Hynes* cases. Since the provision in the 1934 act does not in itself conflict with State land use laws, the Secretary may not create such a conflict pursuant to his power to issue regulations. Accordingly, the regulation, even if intended to effectuate the 1934 act, is invalid.



Further, even if we assume *arguendo* that the provision in the 1934 act might have otherwise authorized the issuance of the Secretary's regulation, his authority to issue the regulation was revoked by the passage of Public Law 280 in 1953, prior to the time that the regulation was issued. The latter act, as we have seen, authorizes the States to apply their land use laws on Indian reservations, to the extent not inconsistent with certain federal laws. Therefore, the Secretary lacked authority to prohibit the application of such State laws after the passage of Public Law 280, whether or not he had such authority before.

To overcome the latter conclusion, the Ninth Circuit ruled that Public Law 280 did *not* revoke the Secretary's authority to issue the regulation, because Public Law 280, in precluding the States from applying an "encumbrance" against Indian trust property, *independently* prohibits the States from regulating the use of such property. App. 23-25. We will show, in the next portion of this petition, that the "encumbrance" exception cannot be so construed, for otherwise that exception would be inconsistent with the provision authorizing the States to "regulate the use" of such property under limited circumstances. For the moment, however, we note only that, if the Secretary's regulation can only be sustained because Public Law 280 *independently* prohibits the States from regulating such property, the prohibition derives directly from the statute, not from the regulation. In that event, the regulation adds nothing to existing law, and thus has no significance in this case.

Thus, the logic employed by the court is strange indeed. To avoid the conclusion that the regulation is invalid under Public Law 280, the court concludes that the regulation was authorized by the 1934 act; however, to avoid the conclusion that this authority was revoked by the subsequent passage of Public Law 280, the court concludes that the

regulation is independently authorized by the latter act. Thus, the court's reasoning is internally inconsistent. Either the Secretary has authority to issue the regulation under Public Law 280, or he does not. If he has such authority, the States may not regulate the use of Indian trust property because of the force of the statute itself, not because of the force of the regulation. If he lacks such authority, he may not nullify the States' limited authority under that act to regulate such property, whether or not his regulation can be rationalized as having been issued under the 1934 act. Thus, either the regulation is irrelevant—in that it adds nothing to existing federal law—or it is invalid. Either way, it has no significance here. The court's decision can only be sustained if Public Law 280, in precluding the application of a State "encumbrance" on Indian trust property, independently prohibits the States from regulating such property, a question which we shall now examine.

**C. "ENCUMBRANCE" OF INDIAN TRUST PROPERTY.**

Public Law 280 precludes a State from imposing an "encumbrance" on Indian trust property. 28 U.S.C. § 1360 (b). The Ninth Circuit concluded that the meaning of this word "is of course ambiguous," and thus, under the usual canon of construction, should be construed as including county land use restrictions. App. 23-24.

However, the court's conclusion is patently inconsistent with other language in Public Law 280. As noted earlier, the act expressly excepts Indian trust property from a State "*regulation* of the *use*" of such property, if the regulation is inconsistent with a federal treaty, agreement, statute or regulation. (Emphasis added.) Thus, this exception clearly authorizes State "regulation of the use" of such property, such as county land use restrictions, under circumstances



spelled out in the act. However, if the "encumbrance" exception is construed as including a "regulation of the use" of such property, the "encumbrance" exception would totally preclude the "regulation of the use" of such property under *any* circumstances. Under this construction, the two exceptions would be in conflict. The "encumbrance" exception would absolutely prohibit the State regulation, and the "regulation" exception would authorize the State regulation under limited circumstances. Thus, the one exception would prohibit that which the other exception, under limited circumstances, permits. The canon of construction favored by the Ninth Circuit is not a substitute for the normal rule of statutory construction that requires the various parts of a statute to be construed harmoniously. See, *e.g., Schneiderman v. United States,* 320 U.S. 118 (1943). Hence, the "encumbrance" exception clearly does not apply to State laws, such as county land use restrictions, that regulate the use of Indian trust property. This conclusion has been embraced by *every* court in California, both a federal and State levels, which has considered this question prior to the instant case. See *Rincon Band v. County of San Diego,* 324 F.Supp. 371, 376-377 (S.D. Cal. 1971), *dismissed as moot* 495 F.2d 1 (9th Cir. 1974); *Agua Caliente Band v. City of Palm Springs,* 347 F.Supp. 42, 49-50 (C.D. Cal. 1972), *dismissed as moot* (9th Cir., unpublished order of Jan. 24, 1975); *People v. Rhodes,* 12 Cal.App.3d 720, 90 Cal. Rptr. 794 (1970); *Madrigal v. County of Riverside,* No. 70-1893-EC (C.D. Cal), *dismissed as moot* 495 F.2d 1 (1974); *Ricci v. County of Riverside,* No. 71-1134-EC (C.D. Cal. 1972), *dismissed as moot* 495 F.2d 1 (9th Cir. 1974).

The Ninth Circuit tried to sustain its result by stating, with absolutely no reference whatsover, that the "encum-

brance" exception applies to Indian *property*, and the "regulation" exception applies to Indian *activity* which only incidentally affects property. App. 24-25 nn. 19, 20. But this distinction is wholly inconsistent with the language of the statute. According to the statute, *both* the "encumbrance" and "regulation" exceptions, which are part of the same savings clause, apply to the *same* subject matter, *i.e.* to "real or personal *property* . . . belonging to any Indian or Indian tribe, band, or community that is held in trust by the United States." 28 U.S.C. § 1360(b). (Emphasis added.) Therefore, both exceptions apply equally to *property*, and indeed to the same type of property. Hence, the exceptions cannot be distinguished on grounds that they are applicable to different subject matter, that one is applicable to property and the other to activity. The Ninth Circuit reached the opposite conclusion only by ignoring the clear language that appears on the face of the statute itself.

Beyond the statutory language, there is no useful distinction between a regulation of "property," and a regulation of "activity" that indirectly affects property. Suppose, for example, that a county zoning ordinance permits residential but not industrial development in a particular area, thereby prohibiting the construction of a sawmill; the Ninth Circuit would presumably prohibit the application of this ordinance on an Indian reservation, since it directly regulates "property." However, suppose instead that the county ordinance prohibits any person from transporting logs through residential areas; the Ninth Circuit would presumably allow the application of this ordinance on an Indian reservation, since it constitutes a regulation of "activity" that only indirectly affects property. But the latter ordinance would effectively prevent an Indian from operating a sawmill on a reservation, and thus would have



the same effect as the former ordinance. Thus, a regulation of "activity" can be sufficiently stringent to prevent a property owner from using his property in a certain way, and thus have the same effect as a regulation of "property." Clearly the distinction suggested by the court is one of form, not substance. It would allow the State to accomplish indirectly that which it cannot accomplish directly. The distinction is thus wholly unrelated to the purposes which Public Law 280 was intended to serve.

The impracticality of the court's distinction between "property" and "activity" is apparent from the fact that the court itself failed to utilize the distinction in considering the various county ordinances involved in this case. Kings County's zoning ordinances presumably constitute a regulation of "property," under the court's analysis. However, the county's ordinance that requires the preparation and consideration of an environmental impact report under CEQA presumably constitutes a regulation of "activity," since the report provides the county with information and does not directly regulate "property." Nonetheless, the court held *both* ordinances inapplicable to the plaintiffs' homes. Thus, the court, by failing to apply its own distinction to the facts of the case, avoided the very factual thicket which it directed other courts to enter in future cases.

For the above reasons, it is clear that Public Law 280 can be given a harmonious construction only by construing the word "encumbrance" as *not* including State regulation of the use of property. Moreover, this result accords with the usual meaning of the word "encumbrance," as used in the field of property law. That word is used in covenants guaranteeing that property is free of "encumbrances," a

guarantee that enables a buyer of the property to void the purchase contract if the property is in fact "encumbered." *E.g., Hall v. Risley,* 188 Or. 69, 213 P.2d 818 (1950); *Miller v. Milwaukee Odd Fellows Temple,* 206 Wis. 547, 240 N.W. 193 (1932); 4 Tiffany, Real Property § 1005, p. 141 (3d ed. 1939); 55 Am. Jur., Vendor and Purchaser, § 250. Certainly the buyer cannot void his purchase contract on the grounds that the covenant fails to reveal that the property is subject to various land use laws of the State and its political subdivisions. Accordingly, the courts have clearly ruled that the word "encumbrance" denotes only those property rights and interests held by a third party in the property, such as liens, easements and leases. *Ibid.* In particular, the courts have ruled that the word has no application to land use laws enacted by the State and its political subdivisions pursuant to the State's police power, such as building and zoning restrictions. *Goldfarb v. Dietz,* 8 Wash. App. 464, 506 P.2d 1322, 1325 (1973); *Fritts v. Gerukos,* 273 N.C. 116, 159 S.E.2d 536, 539 (1968).[23] Such laws are enacted for the protection of the public health, safety and welfare, and do not result in the creation of property rights and interests in third persons, *Ibid.*

Our conclusion is further supported by the fact that the word "encumbrance" has historically been used, in the field of federal Indian law, in its usual property sense. Under the historic federal policy against the alienation of Indian property, Congress has passed many laws to protect Indians from divesting themselves, either by "alienation" or "encumbrance," of part or all of their property in commercial

23. However, a *violation* of such land use restrictions may constitute an "encumbrance," since such a violation might result in the imminent imposition of other types of "encumbrances," such as liens. See, *e.g., Goldfarb v. Dietz, supra.*



transactions with the white man, at least without approval by a federal official. As Cohen noted, the policy sprang from "the desire to protect the Indian against sharp practices leading to Indian landlessness, [and] the desire to safeguard the certainty of titles . . . ." Cohen, *Handbook of Indian Law* (U.S. Govt. Printing Off., 1942), 221; see generally U.S. Dept. of Interior, *Federal Indian Law* (U.S. Govt. Printing Off., 1958), 40-43, 61-62, 675-685, 787-791, 798-803. As this Court has stated, the Indians "needed to be safeguarded against their own improvidence during the period of transition [from a state of dependent wardship to one of full emancipation]." *Smith v. McCullough,* 270 U.S. 456, 464-465 (1926); see also *United States v. Waller,* 243 U.S. 452 (1917).[24] Accordingly, the General Allotment Act of 1887, 24 Stat. 388, the basic Indian law for nearly a half century, provided that Indians should be free of any "charge or *incumbrance*" at the time they receive a fee patent for their trust allotments. *Id.* at 389. (Emphasis

24. "These limitations upon the power of the Indians to sell or make contracts respecting land that might be set apart to them for their individual use and benefit were imposed to protect them from the greed and superior intelligence of the white man. Congress well knew that if these wards of the nation were placed in possession of real estate, and were given capacity to sell or lease the same, or to make contracts with white men with reference thereto, they would soon be deprived of their natural holdings; and that, instead of adopting the customs and habits of civilized life and becoming self-supporting, they would speedily waste their substance and very likely become paupers. The motive that actuated the lawmaker in depriving the Indians of the power of alienation is so obvious, and the language of the statute in that behalf is so plain, as to leave no room for doubt that Congress intended to put it beyond the power of white men to secure any interest whatsoever in lands situated within Indian reservations that might be allowed to Indians." *Beck v. Flournoy Livestock & Real-Estate Co.,* 65 Fed. 30 (8th Cir. 1894).

added.)[25] Similarly, the Indian Reorganization Act of 1934, 48 Stat. 984, which replaced the 1887 act as the basic Indian law, enabled Indians to adopt tribal constitutions to prevent the "sale, disposition, lease, or *encumbrance* of tribal lands, interests in lands, or other tribal assets." *Id.* at 987. (Emphasis added.) Thus, the limitation against an "encumbrance" in Public Law 280 was intended merely to continue the historic federal policy against the alienation of Indian lands, by limiting the extent to which the white man can, in commercial transactions with Indians, acquire a property interest in the Indians' trust property. It was intended to protect Indians against their own folly. It was not intended to prevent the State and its political subdivisions from regulating the use of such property, to the extent necessary to protect the public health, welfare and safety. The Ninth Circuit failed to even consider the meaning of the word "encumbrance" in the context of the historic federal policy against alienation.

**D. THE FEDERAL ASSISTANCE PROGRAMS.**

As we have noted, Public Law 280 prohibits the State from regulating the use of Indian trust property inconsistently with a federal "statute." 28 U.S.C. § 1360(b). The Ninth Circuit held that the county's ordinances are inconsistent with federal statutes authorizing the BIA to administer its HIP program, and the IHS to provide sanita-

25. In *Quinault Allottee Ass'n v. United States,* 485 F.2d 1391, 1396 (Ct. Cl. 1973), the court ruled that, in the 1887 act, "Congress was speaking only in conventional terms of an encumbrance on the fee, such as would be represented by a lien or a mortgage." Accordingly, the court ruled that administrative charges incurred by the United States resulting from timber sales did not constitute an "encumbrance," and thus could be deducted from the proceeds of the sales.



tion aid to Indians. App. 25-27.[26] In fact, there is no inconsistency between these federal statutes and the county's ordinances. The statutes merely authorize the BIA and IHS to develop programs for the distribution of funds appropriated by Congress for Indians; for instance, the HIP program was developed by the BIA pursuant to a statute authorizing the BIA to "direct, supervise, and expend" funds appropriated by Congress for Indians. 25 U.S.C. § 13. These statutes do not in any way limit or affect the application of State or county land use laws on Indian reservations.

Since the county's ordinances are not inconsistent with the federal *statutes* pursuant to which the BIA and IHS developed their assistance programs, the Ninth Circuit must have assumed that the ordinances are inconsistent with the *programs* themselves. However, we have already noted that federal agencies lack authority to develop programs that limit the applicability of State laws on Indian reservations, where Congress itself has not authorized the limitation of such State laws. See p. 28, *supra; Organized Village of Kake v. Egan,* 369 U.S. 60, 63 (1962); *Hynes v. Grimes Packing Co.,* 337 U.S. 86 (1949). In fact, Public Law 280 clearly authorizes the application of State land use laws on Indian reservations under limited circum-

26. The Court ruled that the county's ordinances are inconsistent with four federal statutes, *i.e.* with (1) 25 U.S.C. § 13, which authorizes the BIA to "direct, supervise, and expend" funds which Congress appropriates for Indians, (2) 86 Stat. 508 (1972), otherwise known as Public Law 92-369, which authorizes "grants and other assistance to needy Indians," (3) 42 U.S.C. § 2004a, which authorizes various services to be provided to Indians, and (4) 85 Stat. 44 (1971), otherwise known as Public Law 92-18, which appropriate funds for "Indian health services." The BIA's HIP program was developed pursuant to the first two statutes, and the IHS's sanitation aid program was developed pursuant to the latter two statutes.

stances, as we have seen. See pp. 22-24, *supra*. Therefore, the federal statutes cited by the court do not enable the BIA and IHS, under their authority to develop assistance programs, to thereby revoke the States' limited authority under Public Law 280.

In fact, there is no inconsistency between the programs of the BIA and IHS and the county's ordinances in this case. The federal programs merely provide financial and other assistance to Indians. They do not limit, even inferentially, the application of county land use ordinances applicable to property which is the subject of such programs. The county's ordinances merely require the plaintiffs to obtain administrative approval before using their mobile homes in particular locations, and to pay minor fees and obtain minor permits. See pp. 4-5, *supra*. It is thus entirely consistent for the federal agencies to provide financial assistance enabling the plaintiffs to buy their mobile homes, and the county to apply its ordinances to insure that the mobile homes will be used consistently with State and local land use interests. Thus, the county's ordinances do not conflict with the assistance programs of the BIA and IHS, much less with the federal statutes pursuant to which the programs were developed.

Virtually all Indian trust property receives assistance, in one form or another, from programs developed by the BIA or other federal agencies pursuant to congressional authorization. To conclude that such property is thereby immune from State land use laws would effectively preclude the application of those very laws which Public Law 280 made applicable to such property. Congress surely did not intend for the assistance programs developed by federal agencies to be used as an excuse to nullify the authority which it gave the States under Public Law 280.



This conclusion clearly appears from the legislative history of one of the federal statutes cited by the court, and it is significant that the court again made no reference to this history. According to the Senate report preceding the enactment of 42 U.S.C. § 2004a, which authorizes the IHS to provide sanitation aid to Indians:

> "This proposed legislation is in line with the policy of the Congress and the Department of the Interior to terminate duplicating and overlapping functions provided by the Indian Bureau for Indians by transferring responsibility for such functions to other governmental agency wherever feasible, and the enactment by the Congress of legislation having as its purpose to repeal laws which set Indians apart from other citizens, such as the following Acts recently enacted by the Congress: . . . The Act of August 15, 1953 (Public Law 280, 83d Cong., 1st Sess.) conferring of civil and criminal jurisdiction over Indians upon certain states . . . ." S.Rep. No. 1530, 83d Cong., 2d Sess. 2 (1954).

This statement clearly indicates that Congress did not regard the federal statute as inconsistent with the jurisdiction given to the States under Public Law 280.

## CONCLUSION

The clear, unambiguous language of Public Law 280 indicates that the States and their political subdivisions are authorized to apply their land use laws on Indian reservations. The meaning of this language is easily confirmed by the act's legislative history. The Ninth Circuit, by ignoring both the clear language of the act and its legislative history, has contrived a result that completely overturns what Congress meant to accomplish in passing the act. Its decision shows how far a court can go in using the canon of construction, applicable only where a federal Indian law is ambiguous, to reach a result opposite to that intended by Congress.

The Ninth Circuit's decision prevents California, and other States which have received jurisdiction over Indian reservations under Public Law 280, from fully protecting their land use interests, as those interests are affected by the use of land on Indian reservations. Indeed, California has a vital interest in such land uses. Such uses have a profound effect on many of the State's resources, such as its water and air, an effect that is not confined to the reservation's boundaries. A sawmill on a reservation, for example, may pollute the water and air adjacent to the sawmill, and the pollutants may be carried to off-reservation areas. The protection of the State's off-reservation forests in *People v. Rhoades,* 12 Cal.App.3d 720, 90 Cal. Rptr. 794 (1970), depended on the State's ability to require an Indian to build a firebreak around his on-reservation house. Thus, the State's interest in reservation land uses permeates the boundaries of the reservation itself. It is not sufficient to suggest that federal or tribal authorities can adequately protect these interests, for these authorities do not typically regulate, at least to any substantial degree, land uses on



Indian reservations. Therefore, the lower court's decision effectively frees such reservations of any effective land use controls altogether, and ignores the State's interest in applying such controls.

We recognize, of course, that the State's interest in regulating land use of Indian reservations may be subject to stringent limitations in States which have not received jurisdiction over such reservations under Public Law 280. Cf. *McClanahan v. Arizona State Tax Comm'n,* 411 U.S. 164 (1973). But these limitations are clearly not applicable, at least to the same degree, in States which have received such jurisdiction. Moreover, we recognize that, even in the latter States, the State's interest in regulating land use should not override tribal interests in all instances, to the same extent that the State's interest overrides the private interests of its other citizens. However, the tribal interest is fully protected by the limitations contained in Public Law 280 itself, which precludes the States from regulating Indian property inconsistently with a federal treaty, agreement, statute or regulation. Thus, that statute sought to achieve an accomodation between State and tribal interests in the use of land. The Ninth Circuit's decision, in prohibiting the application of State land use laws no matter how compelling the State interest or minimal the tribal interest, destroys that accommodation.

For the foregoing reasons, we respectfully urge the Court to grant our petition for writ of certiorari.

Respectfully submitted,

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*United States Court of Appeals for the Ninth Circuit*

Filed—Nov 3 1975
Emil E. Melfi, Jr. Clerk
U.S. Court of Appeals

No. 74-1565

Santa Rosa Band of Indians; Mark Barrios; and Pete Baga,
*Plaintiffs-Appellees,*

vs.

Kings County; Charles Gardner, Planning Director and Chairman of the Planning Commission of Kings County; and Kings County Planning Commission,
*Defendants-Appellants.*

## OPINION

Appeal from the United States District Court
for the Eastern District of California

Before: KOELSCH and DUNIWAY, Circuit Judges, and KELLEHER,* District Judge.

KOELSCH, Circuit Judge:

This case presents important questions regarding the extent of the civil jurisdiction over Indian reservation trust lands conferred upon state and local governments by P.L. 280, 28 U.S.C. § 1360. Specifically, the suit is a controversy between the Santa Rosa Band of Indians to-

*The Honorable Robert J. Kelleher, United States District Judge for the Central District of California, sitting by designation.

gether with two individual members and Kings County, California, over the applicability of the County's Zoning Ordinance and Building Code on the Santa Rosa Rancheria, the Band's reservation. The Santa Rosa Band is an Indian Tribe organized under § 476 of the Indian Reorganization Act of 1934, 25 U.S.C. §§ 461-478 (1970); legal title to the Rancheria lands is held in trust by the United States for the use and benefit of the Band. *See* 25 U.S.C. § 465.

The background of the dispute is this:

Plaintiffs Barrios and Baga are members of the Santa Rosa Band. They are both poor. Each has been living with his family on an assignment (a plot of the trust land) within the Rancheria, but in totally inadequate housing. To remedy his family's housing problems, each applied in early 1973 to the Bureau of Indian Affairs (B.I.A.) for assistance in procuring mobile homes under the Bureau's Housing Improvement Program (H.I.P.). After examining the purchase documents for the mobile homes tentatively selected, the B.I.A. approved both purchases, and authorized the maximum H.I.P. grants available, $3,500, to apply towards the purchase prices. At the same time, the Indian Health Service (I.H.S.), an agency within the Department of Health, Education and Welfare, as part of a widespread project to upgrade various California Reservation water and sanitation systems, made plans to provide plaintiffs' H.I.P. housing with water and sanitary plumbing.[1]

1. During oral argument the court on its own motion raised the issue of whether or not this dispute presented a justiciable case or controversy. In supplemental memoranda both parties took the affirmative, but on different bases. Appellees argued that the record affirmatively established actual threats of Kings County's enforcement of its Zoning Ordinance. Appellants, on the other hand, urged that although no direct enforcement action against the Rancheria is apparent, the very existence of the Ordinance is sufficient here to create a justiciable controversy. The court has only recently removed all doubt concerning this question. In *Construction Industry Assn. of Sonoma County v. The City of Petaluma*, ..... F.2d ..... (No. 74-2100, 9th Cir. Aug. 13, 1975), we held that a zoning ordinance which operated of itself adversely to affect the value and marketability of the owners' lands for residential uses constituted a sufficient threat of a direct and personal injury to the landowners to enable them to commence and prosecute a declaratory suit. We thus turn to the merits.



However, after purchasing the mobile homes, plaintiffs learned that under § 402 of the County Zoning Ordinance (Kings County Ordinance No. 269) the Rancheria was zoned as a General Agricultural District, and, under § 402C(7), that use of a mobile home as a residence in such an area is permitted only with prior administrative approval, and then only for a maximum period of two years. Plaintiffs were informed by County officials that to obtain the discretionary administrative approval an application had to be submitted to the County Zoning Administrator, accompanied by a fee to defray the Planning Department's expense in preparing a required environmental impact report, and a site plan. Approval is granted if the Administrator decides that the proposed use is in conformity with the other provisions and objectives of the Zoning Ordinance. § 1803, Zoning Ordinance. Plaintiffs were advised that the County Building Code required inspections and permits for utility hookups and for the plumbing work which the I.H.S. planned to perform; these permits, too, entailed payment of fees. Plaintiffs lack money to pay the fees to seek the permits and have been unable to obtain mail service, utility hookups, or the I.H.S. water and sanitation services; they are presently deprived of the full use of the housing.

Being of the opinion that the County lacked jurisdiction to enforce its land use ordinances on the Rancheria,

Barrios and Baga, and the Santa Rosa Band (several of whose members are presently awaiting H.I.P. mobile home grants) brought this action for declaratory and injunctive relief to restrain enforcement of the ordinances. The district court granted the requested relief. The County appealed; we affirm, except for some modification we require in the judgment entered below.

At the outset, we emphasize that this suit involves an attempt to regulate Indian use of Indian trust lands. We are clear, regardless of the modification worked in the exclusive Federal jurisdiction and tribal sovereignty doctrines of *Worcester v. Georgia,* 31 U.S. (6 Pet. 515) 350 (1882), by subsequent Court decisions such as *Organized Village of Kake v. Egan,* 369 U.S. 60 (1962), and *Williams v. Lee,* 358 U.S. 217 (1959), that in any event any concurrent jurisdiction the states might inherently have possessed to regulate Indian use of reservation lands has long ago been pre-empted by extensive Federal policy and legislation. *Warren Trading Post Co. v. Arizona Tax Comm'n.,* 380 U.S. 685 (1965); *McClanahan v. Arizona State Tax Comm'n.,* 411 U.S. 164, 176, 176 n.15 (1973); *Mescalero Apache Tribe v. Jones,* 411 U.S. 145 (1973); *Williams v. Lee, supra,* at 220-221. Congress, by the Indian Reorganization Act, authorized the government to purchase the lands involved here, and to hold the title in trust; it also authorized adoption of a tribal constitution for the exercise of tribal self-government over the area. 25 U.S.C. § 476. Against the historical backdrop of tribal sovereignty (subject only to the paramount power of the United States) over reservation lands, we have little doubt that Congress assumed and intended that states had no power to regulate the Indian use or governance of the reservation provided, except as Congress chose to grant that power.



*McClanahan, supra, at* 175.[1a] Indeed, P.L. 280, by defining the limits of the jurisdiction granted "P.L. 280 states" such as California, necessarily pre-empts and reserves to the Federal government or the tribe jurisdiction not so granted. *See McClanahan, supra,* at 172 n.8. *Cf. Kennerly v. District Court,* 400 U.S. 423 (1971).

Thus the County is without jurisdiction to enforce its zoning ordinance or building code on the Rancheria unless such jurisdiction is explicitly granted by P.L. 280, 28 U.S.C. § 1360. We hold, for a number of alternative reasons, that P.L. 280 does not confer such jurisdiction.

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1a. In *McClanahan* the Court disclaimed reliance on the *Worcester v. Georgia* "platonic" notion of Indian sovereignty in favor of a pre-emption approach, but, as we read its opinion, reached a conclusion very similar to that which would obtain under *Worcester v. Georgia*—that states may not regulate or tax Indian use of the reservation absent Federal consent. The Court distinguished state efforts to regulate off-reservation Indian activities, or reservation activities of non-Indians, from state efforts to tax or regulate Indian use of the reservation, holding the latter pre-empted by the grant of the reservation. Hardly any other result could be reached, either in *McClanahan* or here. The historical model provided by *Worcester v. Georgia* has been used continuously in congressional policy towards the Indians. Reservation of trust lands has long provided a major vehicle for Federal policy towards Indians, and Congress has passed a myriad of statutes over the years dealing with their purchase, allocation, regulation, maintenance and use. *See, e.g.,* 25 U.S.C. §§ 381-390, 391-415, 461-465, 483, 502, 1451, 1466, 1496(f). Congress fashioned a criminal justice system which divided jurisdiction between the federal courts and Indian tribal courts, excluding the states except as to crimes committed on reservations in which neither perpetrators nor victims are Indians. See 18 U.S.C. §§ 1152, 1153; C. Goldberg, *Public Law 280: The Limits of State Jurisdiction over Reservation Indians,* 22 U.C.L.A. L. Rev. 535, 541 (1975). And it gave governing power over the reservation to tribal governing authorities subject to Federal supervision. *See* 25 U.S.C. § 476, 25 U.S.C. § 1301 *et seq. See United States v. Mazurie,* ..... U.S. ....., 42 L. Ed. 2d 706 (1975). We think it unquestionable that the history of congressional dealings with the Indian trust lands is more than adequate to evidence an intent to oust state regulation over the same lands. *See Warren Trading Post, supra.*

The statute provides:

"§ 1360. State civil jurisdiction in actions to which Indians are parties

"(a) [California] . . . shall have jurisdiction over civil causes of action between Indians or to which Indians are parties which arise [within any Indian country within the state] . . . to the same extent that [California] . . . has jurisdiction over other civil causes of action, and those civil laws of such State or Territory that are of general application to private persons or private property shall have the same force and effect within such Indian country as they have elsewhere within the State or Territory:

• • • • •

"(b) Nothing in this section shall authorize the alienation, encumbrance, or taxation of any real or personal property, including water rights, belonging to any Indian or any Indian tribe, band, or community that is held in trust by the United States . . .; or shall authorize regulation of the use of such property in a manner inconsistent with any Federal treaty, agreement, or statute or with any regulation made pursuant thereto; or shall confer jurisdiction upon the State to adjudicate, in probate proceedings or otherwise, the ownership or right to possession of such property or any interest therein.

"(c) Any tribal ordinance or custom heretofore or hereafter adopted by an Indian tribe, band, or community in the exercise of any authority which it may possess shall, if not inconsistent with any applicable civil law of the State, be given full force and effect in the determination of civil causes of action pursuant to this section. . . ."

I. *Grant of P.L. 280 jurisdiction to local governments*

The first impediment to enforcement of the County ordinances is that they are not "civil laws of [the] State . . . that are of general application . . . within the State. . . ."



This is a matter of first impression for this court; district courts in this circuit have split on the issue.[2] Plaintiffs, contending that local ordinances are not state laws of "general application . . . elsewhere within the State," rely on *Donelon v. New Orleans Terminal Co.*, 474 F.2d 1108 (5th Cir. 1973) (holding local ordinances not state laws within the meaning of the Railroad Safety Act of 1970, 45 U.S.C. § 434), and *Moody v. Flowers*, 387 U.S. 97 (1967) (holding local ordinances are not state statutes within the meaning of 28 U.S.C. § 2281, requiring convening of a three-judge district court to enjoin a state statute). *See Board of Regents v. New Left Education Project*, 404 U.S. 541 (1972). The County relies on California cases recognizing that the County is authorized to exercise home rule by the state constitution[3] and within its jurisdiction exercises the state's police power, and on cases such as *Atlantic Coast Line R. Co. v. City of Goldsboro*, 232 U.S. 548 (1914), which hold such local ordinances to be state law within the meaning of the Federal Constitution, and present 28 U.S.C. § 1257, for purposes of determining the appellate jurisdiction of the Supreme Court. *See Restatement (Second) Conflict of Laws* § 3, comment b (1969).

On the whole we find those cases unhelpful except insofar as they demonstrate the obvious—that the phrase "state

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2. The district court in this case, in an unreported opinion, held that local ordinances were not made applicable by P.L. 280. *Santa Rosa Band of Indians v. Kings County*, Civ. No. F-836 (E.D. Cal. Oct. 12, 1973). *Compare Rincon Band of Mission Indians v. County of San Diego*, 324 F. Supp. 371, 373-376 (S.D. Cal. 1971), *rev'd on other grounds*, 495 F.2d 1 (9th Cir. 1974).

3. Section 7, Article XI, of the California Constitution provides:

"A county or city may make and enforce within its limits all local, police, sanitary and other ordinances and regulations not in conflict with general laws."

statute" (and even more so, "civil laws of [the] State of general application . . . elsewhere within the State . . .") is ambiguous. *See* Note, *The Extension of County Jurisdiction over Indian Reservations in California: Public Law 280 and the Ninth Circuit,* 25 Hastings L.J. 1451, 1485 (1974). The statute may be read either as only making applicable to Indian reservations those civil laws passed by the state legislature which are of statewide application, or, additionally, also to make applicable county or municipal ordinances which apply equally to Indians and non-Indians.[4]

To resolve that ambiguity in P.L. 280, we begin with the fundamental postulate, enunciated in *Worcester v. Georgia, see* 31 U.S. at 393, that ambiguities in Federal treaties or statutes dealing with Indians must be resolved favorably to the Indians. *See McClanahan, supra,* at 174-175; *Menominee Tribe v. United States,* 391 U.S. 404 (1968); *Kimball v. Callahan,* 493 F.2d 564 (9th Cir. 1974). This principle is somewhat more than a canon of construction akin to a Latin maxim, easily invoked and as easily disregarded. It is an interpretive device, early framed by John Marshall's legal conscience, for ensuring the discharge of the nation's obligations to the conquered Indian tribes. The Federal government has long been recognized to hold, along with its plenary power to regulate Indian affairs, a trust status to-

4. The plaintiffs point out that the local ordinances involved here have no force and effect in the State of California outside the County, and argue that to read "civil laws of such State" to include the County ordinances renders nugatory the clause "same force and effect . . . as they have elsewhere within the State . . . ." There is some force to plaintiffs' contention but it is inconclusive; the county in which the local ordinance has force is "elsewhere within the State . . ." in the sense that it is not within Indian country, and the local legislation thus made effective is not directed solely at the reservation. While the latter reading is admittedly somewhat strained, we think it sufficiently plausible that we choose to rest on a different ground.



wards the Indian—a status accompanied by fiduciary obligations. *See Seminole Nation v. United States,* 316 U.S. 286, 297 (1942); *United States v. Kagama,* 118 U.S. 375 (1886); *Beecher v. Wetherly,* 95 U.S. 517, 525 (1877); *Cherokee Nation v. Georgia,* 30 U.S. (5 Pet.) 1, 12 (1831).[5] While there is legally nothing to prevent Congress from disregarding its trust obligations and abrogating treaties or passing laws inimical to the Indians' welfare, the courts, by interpreting ambiguous statutes in favor of Indians, attribute to Congress an intent to exercise its plenary power in the manner most consistent with the nation's trust obligations. *See Squire v. Capoeman,* 351 U.S. 1, 7-8 (1956).

Applying that principle of construction here, we have little difficulty in concluding, in light both of the immediate burden the County ordinances would place on these plaintiffs, and more generally of the devastating impact the County's construction of the statute would have on tribal self-rule and tribal economic development of reservation resources,[6] that P.L. 280 subjected Indian Country only to the civil laws of the state, and not to local regulation.

The County argues that because P.L. 280, and particularly the legislative history of the act, is assimilationist in tone, a congressional intent to make the broader grant of jurisdiction must be found. (Indeed, seizing on language in the legislative history indicating the desirability of making Indians full and equal citizens a district court in this circuit

5. In *Kagama* the Court stated:
"These Indian tribes *are* the wards of the nation. . . . Because of the local ill feeling the people of the states where they are found are often their deadliest enemies. From their very weakness and helplessness, so largely due to the course of dealing of the federal government with them, and the treaties in which it has been promised, there arises the duty of protection, and with it the power." 118 U.S. at 383-384.

6. *See* Goldberg, *supra* n. 1, at 575-576; Hastings L.J., at 1458.

has interpreted the statute as equally subjecting reservation Indians to the full panoply of state, county and municipal ordinances faced by other citizens. *Rincon Band of Mission Indians v. County of San Diego,* 324 F. Supp. 371, 373-376 (S.D. Cal. 1971), *rev'd on other grounds,* 495 F.2d 1 (9th Cir. 1974), *cert. denied,* 43 USLW 3281 (Nov. 11, 1974). *See* Hastings L.J., *supra,* at 1488-1489; C. Goldberg, *Public Law 280: The Limits of State Jurisdiction over Reservation Indians,* 22 U.C.L.A. L. Rev. 535, 581 (1975) [hereinafter Goldberg]). We cannot agree; we are unpersuaded by such general statements of assimilationist intent in the context of the specific problem at hand.

There is nothing specific in the legislative history shedding any light on whether or not Congress intended to subject reservation trust lands to local civil or criminal ordinances. If anythin the legislative history indicates that Congress gave the problem little, if any, thought. The original impetus for P.L. 280 was a perceived need to extend state criminal jurisdiction to certain California reservations; by the time the bill was passed, it had mushroomed into a general measure conferring a degree of state criminal and civil jurisdiction on several states. However, civil jurisdiction was extended almost as an afterthought. There is very little in the legislative history indicating the congressional rationale for extending civil jurisdiction, or to indicate the extent of that jurisdiction. *See* Goldberg, at 540-544. And there is no indication that Congress gave any thought or study to the effects on, or prospective nature of, the relationship, insofar as regulation of reservation civil affairs was concerned, which would thereafter exist between the B.I.A., administrator of the trust property, the states, local governments, and Indian tribes, which theretofore exercised substantial self-government over the reservation.



In light of the absence of more specific guidance in the statute or legislative history, we decline to extend jurisdiction to the County solely on the basis of general expressions of sentiment regarding the desirability of terminating Federal paternalistic supervision of tribes or the need for making Indians equal first class citizens—a construction denying the County jurisdiction probably serves those purposes as well or better than one granting it.

Moreover, despite the broad language in the legislative history, the statute itself is not altogether assimilationist in character, and was passed against a substantial backdrop of Indian legislation and policy with which it must be integrated. As one commentator recently noted:

> "Over the years, Congress and the Department of the Interior, which have shared responsibility for formulating and implementing federal Indian policy, have operated on a variety of divergent models for appropriate interaction between the Indians and the states. One model focuses on the inclusion of Indian reservations within state boundaries, the rights of Indians as state citizens, and the desirability of Indian assimilation into the mainstream of American culture; its policy implications have included removing Indian lands from trust status and subjecting Indians to state law.[7] An-

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"7. This policy shaped the Allotment Act of 1887, ch. 119, 24 Stat. 388-91 (profusely amended, this Act is still in force, 25 U.S.C. §§ 331-58 (1970)), which distributed reservation lands to individual Indians as an incentive to the development of an agrarian way of life. The allotted lands were to be removed from trust status when the Indians demonstrated their adaptation to that way of life. Although no such alteration occurred, the allotment system resulted in indiscriminate liquidation of the federal trust responsibility, often over Indian protests, and a sharp decline in Indian land holdings.

"The same policy accounted for the numerous statutes passed during the 1950's terminating the trust status of indi-

other model focuses on the unique status of Indian tribes as sovereignties antedating the European settlement of America, the special federal responsibility for Indian welfare, and the decentralized nature of jurisdiction in the United States generally; it has tended to produce policies fostering tribal autonomy and economic development of reservations through federal training, subsidies, loans, technical assistance, and insulation from the burdens of state law.[8] In between are models which favor either assimilation or tribal autonomy, but interpose the federal government as an umpire, protecting Indian or state interests against extreme abuses by the other." Goldberg, at 536. (footnotes quoted below)[7] *See* Hastings L.J., *supra,* at 1463-1469.

While on balance P.L. 280 reflects an assimilationist slant in Federal policy,[8] it is a compromise measure. *See* Goldberg, at 537; Hastings L.J., *supra,* at 1489. It did not end the tax exempt status of trust lands, *see* § 1360(b), and significantly limited state regulation of Indian trust property. Most importantly, P.L. 280, while passed with an eye towards eventual termination of Federal supervision over

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vidual reservations. *See, e.g.*, 25 U.S.C. § 677 (1970) (Ute); 25 U.S.C. §§ 691-708 (1970) (western Oregon tribes); 25 U.S.C. §§ 891-902 (1970) (Menominee).

"8. Tribal self-government and economic development were encouraged by the Indian Reorganization Act of 1934, 25 U.S.C. §§ 461-78 (1970).

"A return in recent years to similar policies is manifested in President Nixon's 1970 Message to Congress, 116 Cong. Rec. 23131 (1970), and in recent federal legislation facilitating long-term leasing of Indian land. 25 U.S.C. § 415 (1970). *See also* S. Con. Res. 26, 92d Cong., 1st Sess. (1971); S. 3157, 92d Cong., 2d Sess. (1972)." Goldberg, at 536 n. 7 and 8.

8. The statute was passed *in pari materia* with the Menominee Termination Act, 25 U.S.C. § 891 *et seq.*, and the Klamath Termination Act, 25 U.S.C. § 546 *et seq.*



Indian tribes and Indian trust territory, is not itself a termination statute. Congress, recognizing that most Indian tribes living on restricted lands in 1953 were economically or educationally unprepared for termination, undertook a more gradual process; P.L. 280 is only a part of that process. The statute shifted jurisdiction over Indian Country from the Federal government to the states in some respects, but in others prolonged existing Federal supervision and Indian immunity from state jurisdiction, awaiting the decision by Congress, on a case-by-case basis, that termination of a particular tribe, with consequent imposition of all aspects of state jurisdiction,[9] was appropriate. The broad language in the legislative history relied on by the County announces the congressional objectives of the entire termination process, but was not meant to describe the interim status of Indians or trust lands before completion of the process.

From that perspective, we conclude that Congress did not contemplate immediate transfer to local governments of civil regulatory control over reservations. Prior to passage of P.L. 280, Congress had encouraged, under § 476 of the Indian Reorganization Act, the formation and exercise of tribal self-government on reservation trust lands. A construction of P.L. 280 conferring jurisdiction to local county and municipal governments would significantly undermine, if not destroy, such tribal self-government. By transferring regulation of all matters of local concern to local governments, the tribal government would be left little or no scope to operate. We think it more plausible that Congress had in mind a distribution of jurisdiction

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9. *Compare* P.L. 280, conferring pre-termination jurisdiction, *with* 25 U.S.C. § 564q, the provision of the Klamath Termination Act conferring post-termination jurisdiction on the state.

which would make the tribal government over the reservation more or less the equivalent of a county or local government in other areas within the state, empowered, subject to the paramount provisions of state law, to regulate matters of local concern within the area of its jurisdiction. *See* Goldberg, at 581.

This view finds support in the provisions of § *1360(c)*, which contemplates the continued vitality and operation of the tribal government.[10] *See* Goldberg, at 582. If Congress had intended local governments to supplant tribal ones in regulating matters of concern local to the reservation, we doubt it would have included a provision establishing the continuing validity of tribal ordinances.[11] Furthermore, Indians, who do not own the fee to reservation lands, are unable under many state laws to incorporate reservation lands in order to acquire lawmaking powers. *See* Cal. Gov't Code § 34301 (West Supp. 1974). Thus, the position urged by the County would not only ascribe to Congress the intent substantially to strip Indian tribes of their sphere of self-regulation, but also to leave them in the unequal position of being unable to obtain the measure of self-determination provided by state law to its other citizens.

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10. "Any tribal ordinance . . . heretofore or hereafter adopted by any Indian tribe . . . shall, if not inconsistent with any applicable civil law of the State, be given full force . . . ." 28 U.S.C. § 1360(c).

11. The substantial exceptions attached in § 1360(b) to state exercise of jurisdiction over trust property—precisely the area over which Indian tribes exercise self-government—indicate a congressional unwillingness to subject Indian use of the reservation to hostile legislation even by the state, and are hence inimical to the claims of the reservation's local neighbors, who are potentially more hostile to the Indians than the statewide government, that they were given authority identical to the state's under § 1360(a) to regulate use of the reservation.



A construction of P.L. 280 denying jurisdiction to local governments comports with the present congressional Indian policy. The assimilation policy reflected in P.L. 280 was to a great extent a failure, *see* Hastings L.J., at 1471-1473, and has been discarded[12] in favor of policies fostering Indian autonomy, reservation self-government and economic self-development. *See* n.7 *supra*. *See* Indian Financing Act of 1974, 25 U.S.C. § 1451 *et seq.;* Hastings L.J., at 1472-1473; Goldberg, at 549-551; Comment, *State Jurisdiction Over Indian Land Use: An Interpretation of the "Encumbrance" Savings Clause of Public Law 280,* 9 Land and Water L. Rev. 421, 428-429 (1974); Price, Law and the American Indian 596 *et seq.* (1973), and sources there cited. While we recognize an obligation to follow the congressional intent when construing P.L. 280, we are not obliged in ambiguous instances to strain to implement a policy Congress has now rejected, particularly where to do so will interfere with the present congressional approach to what is, after all, an ongoing relationship. *See Capitan Grande Band of Mission Indians v. Helix Irrigation District,* No. 73-2956 (9th Cir., Mar. 14, 1975), slip opinion at 2 n.2.

As previously noted, extension of local jurisdiction is inconsistent with tribal self-determination and autonomy. Were regulation of reservation affairs preempted by local governments, present tribal governments would be relegated to the positions of overseers of tax-exempt property, or the board of directors of a business. We are reluctant to enforce such a result, for as the Court recently recognized, tribal governments have long been thought and held to have

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12. The Indian Civil Rights Act of 1968, codified at 25 U.S.C. §§ 1311-1312, 1321-1326, amended P.L. 280 by making state assumption of jurisdiction contingent upon tribal consent, thereby ending the process of unwilling termination.

inherent sovereign powers of government within Indian Country.

> "[I]ndian tribes are unique aggregations possessing attributes of sovereignty over both their members and their territory, *Worcester v. Georgia,* 6 Pet. 515, 557 (1832); they are 'a separate people' possessing 'the power of regulating their internal and social relations . . . .' *United States v. Kagama,* 118 U.S. 375, 381-382 (1886); *McClanahan v. Arizona State Tax Comm'n,* 411 U.S. 164, 173 (1973).
>
> "Cases such as *Worcester, supra,* and *Kagama, supra,* surely establish the proposition that Indian tribes within 'Indian country' are a good deal more than 'private, voluntary organizations' . . . These same cases in addition make clear that . . . [Indian tribes are] . . . entities which possess a certain degree of independent authority over matters that affect the internal and social relations of tribal life. . . ." *United States v. Mazurie,* ..... U.S. ....., 42 L. Ed. 2d 706, 716-717 (1975).

Moreover, tribal use and development of tribal trust property presently is one of the main vehicles for the economic self-development necessary to equal Indian participation in American life. Extension of local jurisdiction to the reservation would burden that development by increasing its cost. For instance, the building code dealt with in *Ricci v. County of Riverside,* Civ. No. 71-1134-EC (C.D. Cal., Sept. 9, 1971), *appeal dismissed as moot,* 495 F.2d 1 (9th Cir. 1974), by prescribing quality standards for building materials, made the cost of constructing a home on the reservation prohibitive to most reservations Indians, thereby effectively, albeit unintentionally, locking them into substandard housing conditions. *See* Hastings L.J., at 1474-1475, 1487. But more critically, subjecting the reservation



to local jurisdiction would dilute if not altogether eliminate Indian political control of the timing and scope of the development of reservation resources, subjecting Indian economic development to the veto power of potentially hostile local non-Indian majorities. Local communities may not share the usually poorer Indians' priorities, or may in fact be in economic competition with the Indians and seek, under the guise of general regulations, to channel development elsewhere in the community. And even when local regulations are adopted in the best of faith, the differing economic situations of reservation Indians and the general citizenry may give the ordinance of equal application a vastly disproportionate impact.

Given the present Federal policies of fostering tribal self-government and economic self-development, we think an interpretation of P.L. 280 excluding local jurisdiction is mandated. The result, given the fact that Indians and surrounding communities are often likely to have differing views of the relative priority of economic development, environmental amenity, public morals,[13] and the like, is that there may inevitably be some abrasion between Indian communities and local neighbors. That, however, does not dictate eliminating Indian jurisdiction. The fact that Indians are involved in the squabble does not make the dispute unusual; precisely the same sort of conflicts often exist between non-Indian local communities with differing priorities. The remedy here, as there, is that when such conflicts involve a matter in which the state has a sufficient stake or interest to legislate, the state may, subject to the limitations of § 1360(b), pass a law of statewide application

13. For instance, in *Rincon, supra,* it appears that the state permitted some forms of gambling, but permitted County regulation of the matter, and that the County had passed an ordinance proscribing the Indians' activity.

resolving the matter. And if the state is unable to act alone, it may seek Federal cooperation.

II. *Application of 25 C.F.R. § 1.4, and the "encumbrance" limitation*

Even assuming these County ordinances were "civil laws of such State or Territory that are of general application to private persons or private property" such that they would have application on the Rancheria under § 1360(a), nevertheless jurisdiction was not granted the County in this instance because the ordinances fall within exceptions enumerated in § 1360(b).

Section 1360(b) denies to the states the authority to regulate real property belonging to an Indian tribe held in trust by the United States in "a manner inconsistent with any Federal . . . statute or with any regulation made pursuant thereto . . . ." 25 C.F.R. § 1.4 provides:

> "§ 1.4 State and local regulation of the use of Indian property.
>
> "(a) Except as provided in paragraph (b) of this section, none of the laws, ordinances, codes, resolutions, rules or other regulations of any State or political subdivision thereof limiting, zoning or otherwise governing, regulating, or controlling the use or development of any real or personal property, including water rights, shall be applicable to any such property leased from or held or used under agreement with and belonging to any Indian or Indian tribe, band, or community that is held in trust by the United States . . . .
>
> "(b) The Secretary of the Interior or his authorized representative may in specific cases or in specific geographic areas adopt or make applicable to Indian lands all or any part of such laws, ordinances, codes, resolutions, rules or other regulations referred to in paragraph (a) of this section as he shall determine to be in the best interest of the Indian owner or owners in achieving the highest and best use of such property. . . ."
>
> 30 Fed. Reg. 7520 (June 9, 1965).



The Secretary has adopted all California state zoning ordinances under this section but has explicitly chosen not "to adopt or make applicable" local ordinances. *See* 30 Fed. Reg. 8722. As Kings County's Zoning and Building Code ordinances are ordinances of a political subdivision "limiting, zoning or otherwise governing, regulating, or controlling the use or development of . . . real . . . property. . . .", County application of its ordinances to the Rancheria is barred by 25 C.F.R. § 1.4(a), and consequently the County is not authorized to exercise jurisdiction under P.L. 280.[14]

We are aware that several commentators have suggested that 25 C.F.R. § 1.4 is invalid because lacking in specific statutory authorization,[15] or because in derogation of the jurisdiction conferred by P.L. 280; and that at least two district courts have refused to apply its provisions for those reasons. *See Rincon Band, supra,* at 377-378; *Norvell v. Sangre de Cristo Development Company, Inc.,* 372 F. Supp. 348 (D. N. Mex. 1974). We conclude that the regulation is valid.

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14. As the County is without jurisdiction to enforce its ordinances, we voice no opinion on whether or not the Federal statutes providing housing and sanitation services evidence an intent to pre-empt County regulation of the housing provided here. The County regulations are inapplicable; the County has no jurisdiction to pre-empt. For the same reason, we voice no opinion on a similar ground relied on by the district court, that Federally authorized and funded construction projects on Federal land are exempt from local regulations which burden the completion of the project. *See Arizona v. California,* 283 U.S. 423 (1931); *City of Birmingham v. Thompson,* 200 F.2d 505, 509 (5th Cir. 1952); *United States v. City of Philadephia,* 147 F.2d 291 (3d Cir. 1945); *United States v. City of Chester,* 144 F.2d 415 (3d Cir. 1944); *Oklahoma City v. Sanders,* 94 F.2d 323 (10th Cir. 1938).

15. *See* Goldberg, at 586 n. 229; Price, *supra,* at 290-293.

Rule-making authority for the "management of all Indian affairs and of all matters arising out of Indian relations" is conferred by 25 U.S.C. § 2; 25 U.S.C. § 9 delegates rule-making authority to "effect the various provisions of any act relating to Indian affairs. . . ." It has been held that neither provision grants general regulatory powers to the Secretary of the Interior; to be valid a regulation must be reasonably related to some other specific statutory provision. *See Organized Village of Kake v. Egan, supra,* at 63; United States Department of the Interior, Federal Indian Law 56-57 (1966); Cohen, Handbook of Federal Indian Law 102-103 (1945). We think 25 U.S.C. § 465, which authorizes the Secretary to purchase land for the "purpose of providing land for Indians" and to take the title to such lands in trust, when read against the history of Federal policy governing use and control of Indian trust property, is sufficient to sustain the regulation as it applies to the Rancheria lands, obtained pursuant to § 465.

Land held in trust for the benefit of Indians has long played the central role in Federal policy towards Indians. Cohen, *supra,* at 94. While the manner in which trust property is held and may be used has been in part defined by statute, a great many of the most significant incidents of the trust property relationship are not statutorily created, but rather a result of judicial definition. The doctrine of Federal ownership of Indian land stems from *Johnson & Graham's Lessee v. McIntosh,* 21 U.S. (8 Wheat.) 240 (1823), which held the general government obtained title through the right of discovery exercised by colonial predecessors. The rudiments of the wardship or trust status of Indian tribes was announced in *Cherokee Nation v. Georgia, supra,* at 12—a consequence of Federal ownership of title to lands the Indians occupied. The exclusivity of Federal jurisdiction over trust lands, whether based on an ownership



theory, *United States v. Kagama, supra,* or commerce clause theory, *Worcester v. Georgia, supra,* was likewise recognized by Court decision. Most importantly for our purposes here, the immunity of Indian use of trust property from state regulation, based on the notion that trust lands are a Federal instrumentality held to effect the Federal policy of Indian advancement and may not therefore be burdened or interfered with by the state, is a product of judicial decision. *United States v. Rickert,* 188 U.S. 432 (1903). Each of these judicially defined characteristics of Indian trust property remained implicit in subsequent congressional enactments dealing with trust property.

The language used in § 465 must be read against this backdrop, which provides the implicit substance of what the language signifies. We are confident that when Congress in 1934 authorized the Secretary to purchase and hold title to lands for the purpose of providing land for Indians, it understood and intended such lands to be held in the legal manner and condition in which trust lands were held under the applicable court decisions—free of state regulation.[16]

In that light, the Secretary's regulation, insofar as it denies to the states the power to zone Federal trust property acquired under § 465,[17] reasonably implements the

16. Section 465 explicitly exempted the lands acquired from state taxation. Rather than reading the omission of a provision exempting the lands from state regulation as evidencing a congressional intent to allow state regulation, we read the omission as indicating that Congress simply took it for granted that the states were without such power, and that an express provision was unnecessary; *i.e.,* that the exemption was implicit in the grant of trust lands under existing legal principles.

17. We leave open the question of the validity of the regulation insofar as it asserts the power of the Secretary *vis-a-vis* an Indian tribe to adopt state or local zoning ordinances on trust property.

statute. The regulation simply expresses the Secretary's understanding of the prior law defining the conditions under which he holds the land acquired and under which the Indians may use the land provided for them, *see* 5 U.S.C. § 301; it is undoubtedly an accurate expression of the congressional understanding of the conditions under which it authorized acquisition of lands for Indian use.[18]

Moreover, in P.L. 280 states such as California, the regulation may be independently justified as an administrative interpretation of the word "encumbrance" in § 1360(b) itself, clarifying the scope of the jurisdiction over trust property granted the states. *See* text at n.19 *infra.*

The question remains whether the regulation is in derogation of the grant of jurisdiction made by P.L. 280. Section 465 was passed in 1934, P.L. 280 in 1953, and the regulation was adopted in 1965. Despite changes in the doctrinal justifications underlying the immunity of trust lands from state supervision which occurred between 1934 and 1965, *see Williams v. Lee, supra; Warren Trading Post, supra; McClanahan, supra,* the substance of that immunity remained relatively unchanged. Whether one

18. We need not decide the validity of the regulation as applied to lands not acquired pursuant to § 465—the lands involved here were so acquired. So far as we can discover, there is no general statute authorizing the holding of title to Indian lands in trust by the United States, as does § 465, or authorizing the Secretary of the Interior to administer trust lands. The first power is apparently an inherent incident of the judicially recognized ownership status; the second derives from the Secretary's 25 U.S.C. § 2 authority. We merely note that as the nature of the trust property relationship between the Federal government and the Indian tribes is rather uniquely a product of judicial decision rather than statute, and as Congress has implicitly acted on it and ratified it for so long, and as that relationship provides the central framework for "Indian relations," that this may be a situation in which the regulation is sustainable under 25 U.S.C. § 2 alone.



views it as a matter of exclusive Federal jurisdiction or Federal preemption, *see* n.1 *supra,* absent a grant of jurisdiction states remained as unable to regulate trust lands in 1965 as they had been in 1934. Thus the regulation promulgated in 1965 accurately defined the conditions under which the trust property involved here was to be held and used, unless the intervening passage of P.L. 280 altered those conditions in mandatory P.L. 280 states such as California by giving the state power to zone trust property. We conclude that it did not.

P.L. 280 expressly disclaims authorizing state "encumbrance of any real . . . property held in trust by the United States . . . ." 28 U.S.C. § 1360(b). The word "encumbrance" is of course ambiguous, and courts have split on whether or not it evidences an intent to exempt trust lands from state zoning and land use regulations. *Compare Snohomish County v. Seattle Disposal Co.,* 70 Wash. 2d 668, 425 P.2d 22 (1967), *cert. denied,* 389 U.S. 1016 (1967) (Douglas and White, J. J., dissenting), *with Rincon Band, supra, and Agua Caliente Band of Mission Indians' Tribal Council v. City of Palm Springs,* 347 F. Supp. 42 (C.D. Cal. 1972), *vacated and remanded* by this court in an unpublished order, January 24, 1975. *See* Hastings L.J., at 1496-1499; Goldberg, at 586-587; Price, *supra,* at 277-283. Relying on the canon of construction applied in favor of Indians, the Court has ruled in different contexts that the word "encumbrance" is to be broadly construed and is not limited to a burden which hinders alienation of the fee, *see Squire v. Capoeman, supra; Rickert, supra; Kirkwood v. Arenas,* 243 F.2d 863 (9th Cir. 1957), rather focusing on the effect the challenged state action would have on the value, use and enjoyment of the land. *See* Hastings L.J., at 1498-1499. *Compare* the majority and dissenting opinions in

*Snohomish, supra.* Following the Court's lead, and resolving, as we must, doubts in favor of the Indians, we think that the word as used here may reasonably be interpreted to deny the state the power to apply zoning regulations to trust property.[19]

We have previously discussed the various reasons of policy and history for narrowly construing the grant of jurisdiction to exclude local governments. In large part similar reasons are applicable here, and no purpose is served by extensive reiteration. Suffice it to say that application of state or local zoning regulations to Indian trust lands threatens the use and economic development of the main tribal resource—here it even handicaps the Indians in living on the reservation—and interferes with tribal government of the reservation. *See* Goldberg, at 587. Consequently, a construction of the term "encumbrance" more consonant with present congressional policy is mandated.[20]

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19. We need not decide the full dimensions of the "no encumbrance to trust property" exception, as we are certain in any event that the regulation's proscription of the local zoning ordinances involved here falls well within it, and is hence not in derogation of the statutory grant. Nevertheless, it has been suggested that the word "encumbrance" might be interpreted so broadly as to eliminate state regulation of all activity occurring on trust property. *See* Goldberg, at 587. We note that 25 C.F.R. § 1.4 is conceivably subject to the same objection. As we read "encumbrance," it is directed, consonant with the flavor of the word's narrow legal meaning, at traditional land use regulations and restrictions directed against the property itself, and does not encompass regulations of activity which only incidentally involve the property. *See Rincon, supra,* at 376-377. However, the full dimensions of the statutory exception, and the validity of 25 C.F.R. § 1.4 when asserted in other contexts as a bar to state jurisdiction, must await determination on a case-by-case basis.

20. Two arguments have been advanced for defining "encumbrance" narrowly. We find neither persuasive. The first, advanced by the dissent in *Snohomish,* is that a broad construction leaves the state without police power to protect the safety of its other citizens living near reservations and was therefore not intended by Congress. The argument is essentially a make-weight—the states were without power to enforce land use restrictions against the reservation before the passage of P.L. 280 and are no worse off if the statute does not confer such authority. Basically the argument is an expression of the assumption that the statute was wholly assimilationist in all its parts, and therefore must be interpreted to give the states the same regulatory power over Indians as exercised over other citizens. *See Snohomish, supra,* at 425 P.2d 27-29 (dissent). For reasons already stated, we do not share that assumption. The second argument, advanced in *Rincon, supra,* is that a broad reading of "encumbrance" to preclude application of zoning regulations to trust lands would render redundant the clause: ". . . or shall authorize regulation of the use of such property in a manner inconsistent with any Federal treaty, agreement, or statute or with any regulation . . . ." We disagree. As we read it, *see* n.19 *supra,* "encumbrance" is narrower than the latter clause, precluding all regulations or restrictions attached directly to land use, whereas the latter clause encompasses all *activity* located on reservation land, permitting comprehensive state regulation except where preempted by or inconsistent with overriding Federal enactments.



As P.L. 280 may reasonably be construed not to grant P.L. 280 states the jurisdiction to zone trust lands, the Secretary's regulation does not contradict the statute; and as it is validly authorized and reasonable, the regulation is entitled to the force and effect of law. Thus, both as a consequence of the regulation, and, independently, of our construction of "encumbrance" in the statute itself, the local zoning ordinance and building code are inapplicable on the Rancheria.

III. *Inconsistency with Federal statutes.*

Finally, application of the ordinances in the circumstances presented here is inconsistent with the statutes authorizing the B.I.A. and I.H.S. to provide housing and sanitation aid to the plaintiffs. The H.I.P. was adopted pursuant to 25 U.S.C. § 13 and funded by P.L. 92-369. The I.H.S. services are provided under 42 U.S.C. § 2004a, using funds appropriated by P.L. 92-18. The purpose of both

statutory programs is to upgrade the deplorable living conditions of many reservation Indians; funds are limited under both programs. Application of various local zoning and building ordinances rather than uniform Federal standards greatly enhances the difficulty of administering the Federal programs, adds expense to already tight budgets, and ultimately detracts from the programs' goals. The fees charged here by the County directly impede the receipt of the Federal services. The Zoning Ordinance, which subjects the Federally provided housing to the discretionary administrative approval of a County official, and to use for a two-year limit, threatens altogether to prevent plaintiffs' use of the housing, and at the very least impedes its provision and use. And the Building Code, which requires permits for the provision of the I.H.S. services, likewise hinders the performance of the duties authorized by § 2004a. We are therefore clear that application of the County's ordinances here is "inconsistent" with the Federal statutes, and that, for this reason as well, the County is without jurisdiction to do so.

Finally, we turn to an issue which the parties have not urged but which we feel we must address—the breadth of the district court's judgment. In our opinion, paragraph 3(b) of the judgment entered is overbroad, going beyond the applicable principles outlined above and beyond the relief requested by plaintiffs. It not only enjoins enforcement of the particular County ordinances in issue which purport to regulate use of the Rancheria, but also prevents enforcement of any County ordinance, now or hereafter enacted, which incidentally "adds expense or inconvenience" to the maintenance "of housing facilities or appurtenances thereto" when funded by a federal agency—it might, for example, be interpreted (improperly, we think)



to enjoin the County from charging Rancheria Indians the same fee for County-supplied water, for sanitation hookups, required of other County residents, or to require the County to otherwise discriminate in favor of the Indians. While controlling principles we have discussed above bar County regulation of Indian land by indirect subterfuges, they do not bar all incidental on-reservation consequences of County regulations. The court must determine on a case-by-case basis when concrete disputes arise whether the County has jurisdiction to enforce a particular ordinance under the applicable jurisdictional principles enunciated above.

Consequently, we vacate paragraph 3(b) of the district court's order and remand for the court to fashion a judgment consistent with all the fundamentals and on all the bases enunciated by this opinion (the presence of Federal funding is not a necessary condition to enjoining defendants' enforcement of County ordinances on trust land), but limited in its language and application to actual or reasonably anticipated grievances arising from disputed ordinances which purport to control what may or must be done on the Indian lands. On remand, the court should make further findings delineating the manner in which any particular County ordinance whose enforcement is enjoined has impermissibly intruded, or threatens to intrude, on Indian use of the Rancheria.

Affirmed in part; vacated and remanded in part.

*United States Court of Appeals*
*for the Ninth Circuit*

Filed—Mar 26 1976

Emil E. Melfi, Jr.

Clerk, U.S. Court of Appeals

No. 74-1565

Santa Rosa Band of Indians; Mark Barrios; and Pete Baga,
*Plaintiffs-Appellees,*

vs.

Kings County; Charles Gardner, Planning Director and Chairman of the Planning Commission of Kings County; and Kings County Planning Commission,
*Defendants-Appellants.*

Before: KOELSCH and DUNIWAY, Circuit Judges, and KELLEHER,* District Judge.

*The Honorable Robert J. Kelleher, United States District Judge for the Central District of California, sitting by designation.

ORDER DENYING PETITION FOR REHEARING AND REJECTING SUGGESTION FOR REHEARING IN BANC

The panel, as constituted in the above case, voted to deny the petition for a panel rehearing and to deny motion of the State of California, et al., to appear, post opinion, as amicus curiae and to file an amicus brief. Judges Koelsch and Duniway voted against a rehearing in banc, and Judge Kelleher recommended that a rehearing in banc be rejected and the motion be denied.



The full court has been advised of the suggestion for an in banc hearing, and no judge of the court has requested a vote on the suggestion for rehearing in banc. F. R. App. P. 35(b).

The petition for rehearing is denied, the motion is also denied, and the suggestion for a rehearing in banc is rejected.

## *Appendix 2*

**28 U.S.C. § 1360.**

(a) Each of the States or Territories listed in the following table shall have jurisdiction over civil causes of action between Indians or to which Indians are parties which arise in the areas of Indian country listed opposite the name of the State or Territory to the same extent that such State or Territory has jurisdiction over other civil causes of action, and those civil laws of such State or Territory that are of general application to private persons or private property shall have the same force and effect within such Indian country as they have elsewhere within the State or Territory:

| State or Territory of | Indian country affected |
|---|---|
| Alaska ..... | All Indian country within the Territory. |
| California ..... | All Indian country within the State |
| Minnesota ..... | All Indian country within the State, except the Red Lake Reservation |
| Nebraska ..... | All Indian country within the State |
| Oregon ..... | All Indian country within the State, except the Warm Springs Reservation |
| Wisconsin ..... | All Indian country within the State. |

(b) Nothing in this section shall authorize the alienation, encumbrance, or taxation of any real or personal property, including water rights, belonging to any Indian or any Indian tribe, band, or community that is held in trust by the

United States or is subject to a restriction against alienation imposed by the United States; or shall authorize regulation of the use of such property in a manner inconsistent with any Federal treaty, agreement, or statute or with any regulation made pursuant thereto; or shall confer jurisdiction upon the State to adjudicate, in probate proceedings or otherwise, the ownership or right to possession of such property or any interest therein.

(c) Any tribal ordinance or custom heretofore or hereafter adopted by an Indian tribe, band, or community in the exercise of any authority which it may possess shall, if not inconsistent with any applicable civil law of the State, be given full force and effect in the determination of civil causes of action pursuant to this section.



## *Appendix 3*

**30 Fed. Reg. 6438 (May 8, 1965):**

*Department of the Interior*

Bureau of Indian Affairs

[25 CFR Part 1]

### STATE AND LOCAL REGULATION OF USE OF INDIAN PROPERTY

Applicability of Rules of the Bureau of Indian Affairs

*Basis and purpose.* Notice is hereby given that pursuant to the authority vested in the Secretary of the Interior by the Revised Statutes, sections 161 (5 U.S.C. 22), and 463, and 465 (25 U.S.C. 2 and 9), and pursuant to other authorizing acts, it is proposed to add a new section to Part 1, Subchapter A, Chapter I, Title 25 of the Code of Federal Regulations, concerning State and local regulation of the use of Indian property.

The purpose of this addition is two-fold. First, it will enunciate and particularize in regulatory form for the benefit and guidance of those concerned the sense of existing law under which laws, ordinances, codes, resolutions, rules or other regulations of a State or its political subdivisions limiting, zoning or otherwise governing, regulating or controlling the use or development of property are inapplicable to trust or restricted Indian property held or used under a lease or other agreement. Second, it will provide for the adoption and application by the Secretary in specific cases, after consultation with the Indian owner, of all or part of any laws enacted by a State or any of its political subdivisions regulating the use of property, which would otherwise be inapplicable.

It is the policy of the Department of the Interior whenever practicable, to afford the public an opportunity to partici-

pate in the rule-making process. Accordingly, interested persons may submit written comments, suggestions, or objections with respect to the proposed regulation to the Bureau of Indian Affairs, Washington, D.C., 20240, within 30 days of the date of publication of this notice in the FEDERAL REGISTER.

Part 1, Subchapter A, Chapter I, Title 25, Code of Federal Regulations, is amended by adding thereto a new § 1.4 to read as follows:

§ 1.4 State and local regulation of the use of Indian property.

(a) Except as provided in paragraph (b) of this section, none of the laws, ordinances, codes, resolutions, rules or other regulations of any State or political subdivision thereof limiting, zoning or otherwise governing, regulating, or controlling the use or development of any real or personal property, including water rights, shall be applicable to any such property leased from or held or used under agreement with and belonging to any Indian or Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States.

(b) The Secretary of the Interior or his authorized representative, after consultation with the Indian landowner, may in specific cases expressly adopt and apply all or any part of such laws, ordinances, codes, resolutions, rules or other regulations referred to in paragraph (a) of this section as he shall determine to be in the best interest of the Indian owner in achieving the highest and best use of such property.

JOHN A. CARVER, JR.,
*Under Secretary of the Interior.*

MAY 4, 1965.

[F.R. Doc. 65-4927; Filed, May 7, 1965; 8:48 a.m.]



## *Appendix 4*

**25 U.S.C. § 465:**

The Secretary of the Interior is hereby authorized, in his discretion, to acquire, through purchase, relinquishment, gift, exchange, or assignment, any interest in lands, water rights, or surface rights to lands, within or without existing reservations, including trust or otherwise restricted allotments, whether the allottee be living or deceased, for the purpose of providing land for Indians.

For the acquisition of such lands, interests in lands, water rights, and surface rights, and for expenses incident to such acquisition, there is authorized to be appropriated, out of any funds in the Treasury not otherwise appropriated, a sum not to exceed $2,000,000 in any one fiscal year: *Provided,* That no part of such funds shall be used to acquire additional land outside of the exterior boundaries of Navajo Indian Reservation for the Navajo Indians in Arizona, nor in New Mexico, in the event that legislation to define the exterior boundaries of the Navajo Indian Reservation in New Mexico, and for other purposes, or similar legislation, becomes law.

The unexpended balances of any appropriations made pursuant to this section shall remain available until expended.

Title to any lands or rights acquired pursuant to sections 461, 462, 463, 464, 465, 466-470, 471-473, 474, 475, 476-478, and 479 of this title shall be taken in the name of the United States in trust for the Indian tribe or individual Indian for which the land is acquired, and such lands or rights shall be exempt from State and local taxation.